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# THE SUPREME COURT DECISIONS

## THE JUDGMENT

BY PETER S. GROSSCUP

THE request of the REVIEW for an article on the decision of the Supreme Court in the Standard Oil case does not, I take it, call for a review of the decision as it affects the particular case of the Standard Oil Company; nor a review of the purely legal grounds upon which the court shifted its interpretation of the Sherman Act from that adopted in the Trans-Missouri case, decided in 1897, to that adopted in the present opinion. Such a review would be interesting chiefly to lawyers; and to lawyers as lawyers, no exposition need be added to that contained in the opinion of the Chief Justice.

The interest of the public in the interpretation just given to the Sherman Act by the Supreme Court is because it is a decisive *event*—as the Dred Scott case fifty years before was a decisive event—in the line of events along which the political and economic life of the nation travels. Like the Dred Scott case, the significance of the decision is not in what was done with the particular matter before the court, but what was laid down as the law governing such matters in general. As in the Dred Scott case, the court here traveled away from the particular case in hand, that the decision might settle once and for all what is now, as what

was then, the most prominent question in the public mind. And, as in the Dred Scott case, when the smoke has cleared away it will be found that nothing permanent has been settled—that issues as deep as the cause that now underlies the public unrest are not finally settled by *any* pronouncement that does not proceed from the public mind, made up in its own way and after its own processes of arriving at conclusions. But here the resemblance ends; for, unlike the Dred Scott case, what the court in this case has laid down as the law is not mere dicta—what the court laid down respecting the reasonableness or unreasonableness of restraint of trade to bring it within the prohibition of the act was essential to arriving at a definition or standard by which the particular case might be measured; and, unlike the Dred Scott decision also, this Standard Oil decision, instead of cumbering the ground, completely clears it for the beginning of what I believe will be the public's final way of settling existing problems.

When this number of the REVIEW is issued the Sherman Act will just have become of age—it was passed July 2d, 1890. The first third of its life was a period of coma—though written into the book of laws, it did not stir. Then came the Trans-Missouri case—a case of railroads in alleged combination respecting rates. Here for the first time the services of the interpreter were called for. In strict letter the act prohibits "every contract combination in form of trust or otherwise or conspiracy in restraint of trade." No qualifying words are in the language of the act. The argument of the railroads in the Trans-Missouri case was that the act was meant to prohibit only unreasonable restraint of trade; that it was only unreasonable restraint of trade that was prohibited at common law; that the act was only the re-enactment of the common law into the jurisprudence of the United States, because as a sovereignty separate from the States, the United States, in the absence of statutory re-enactment, would have had no such provision of the common law. But the majority of the Supreme Court, one justice dissenting, said, No—they would not "read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government"; the qualifying word "unreasonable" was not in the language of the act—the court would not write it in. And thus the act stood—the reasonableness or unreasonableness of

the restraint of trade involved in each case being immaterial —for the next fourteen years and until the majority of the court, speaking in this Standard Oil decision, now says that the word "unreasonable," though not written in so many syllables and letters into the language used, was as effectively there as if so written.

It would be mere hypocrisy to say that the court has not turned upon itself. What the court fourteen years ago said was not in the act the court now says *is* in the act. Meantime not a letter of the act has been changed. What has changed is the attitude of the public mind—the public mind, informed by this fourteen years of experience. There are windows in the Supreme Court room from which what is going on in the world outside is in plain sight. The interpretation put upon the act fourteen years ago was hailed at that time as the people's salvation from impending conditions. The *repeal* of that interpretation in the opinion now filed is hailed again as a rescue of the people from impending conditions. Why this abrupt turn and this rapid march "on the back track"? Or is it the *back* track?

The explanation is that the Sherman Act as previously interpreted was a wholly misconceived and misdirected public experiment. It was loaded with disappointment to those who sincerely are looking forward to a national prosperity more widely distributed, and with dynamite to those whose interest is wholly in the present. As a road to restored "individualism" in trade and commerce it led nowhere; every one of its boasted achievements, like the Northern Securities case, for instance, faded entirely away the moment the last line of the decree had been written. The "dissolutions" were dissolutions on paper only; they produced no effect either on the conditions of trade or the relation of individual men to opportunities in trade. Where change followed at all, it was in the direction not of individualism, but of more intensive concentration—the previous constituent corporations welded into single corporations—thereby replacing what in law was a "combination" by what in law was a single entity, as in the steel and other industries. And as a road to better business and economic conditions the act had brought the country to the edge of the volcano. It was inevitable that an experiment of that kind would be stopped some time by somebody.

To more clearly understand this let us look at the Sher-

man Act, as previously interpreted, first in perspective and then at its workings in some detail. In their beginnings, commerce and industry were matters carried on by individuals. There were no railroads; transportation was carried on by wagons and stage-coaches; these could easily be commanded by the means of single individuals. Even the ships were so small that a single individual who by no means would be considered rich now could own and sail them. The shops were small; one sees them yet in Europe, the property of an individual. The big factory was unknown; shoes were purchased of the shoemaker, harness from the harness-maker, cigars of the cigar-maker, flour from the town miller, and clothing from the weaver. Steel there was none. Iron was forged in John Smith's furnace and coal came out of Dan Jones's coal-mine. Commerce and industry were almost entirely individual. There were few combinations or occasions for combination, and there were no monopolies except those that had been expressly granted a monopoly. Competition was *in fact* as well as in law the order of the times; and to safeguard competition, combinations that were shown to be hurtful, and monopoly, except such as was granted by the sovereign, was prohibited. It was on this state of facts that the whole law on the subject of combination and monopoly had its beginning. Compactly stated, that principle of law was that, aside from those to whom monopoly had been expressly granted, there should be no monopoly whatever and no *unreasonable* restraint of trade by any kind of contract or combination between individuals.

But in time the economic current changed. Invention came—the forces of matter unlocked by the human mind—and with that came transportation by railroad, much too great an undertaking for any single individual; manufacturing was turned from the little shop, each owned by a worker, to the factory; great mills took the place of the town mill; the steel and iron industries required furnaces so immense that only capital united could build and operate them; and a locking together of ore-fields and coal-fields, placed by nature thousands of miles apart, that only a *still larger* union of capital could bring together; so that commerce and industry in all their larger phases became corporate instead of individual. And this, too, in the face of the fact that in essence every corporation, even the smallest, was to a certain degree combination in restraint of trade. But no

hurtfulness was yet discovered in the restraint of trade resulting.

In time, however, the larger of these corporations became not merely corporate combinations of what otherwise would be individual capital and effort, but monopolies even. Railroads, street railways, telephone and telegraph companies, lighting companies, are all natural monopolies. Two or more railroads between large terminal cities cannot compete with each other in the old sense of competition without either bankrupting themselves or bankrupting all the intermediate country. It was out of competition that the whole system of rebates grew. And some of the larger corporations in commerce and industry, by getting control of trade, have *made* themselves monopolies. The " fact " that modern enterprise operates, and must operate, through combinations, and even monopolies, has become so obvious that every one sees it—every one except the " law." The " law," until this latest decision of the Supreme Court, refused to see it—refuses even now to see it to the extent that monopoly is in some fields of enterprise a helpful figure—that is, the " law " refused and even now partially refuses to accept the whole logical sequence of the times. That the fact cannot be gotten rid of—that it is a necessary sequence of modern conditions—every intelligent mind saw, every intelligent mind except the mind of the " law." The " law," in outward appearance at least, was constantly redoubling its effort to get rid of the fact. At common law, when there was little economic necessity for combination between individuals, only combinations *unreasonably* restraining trade were prohibited. Now, when every great enterprise is carried on by combination the law proclaimed, until this decision came down, that no combination that even tends to limit competition, whether reasonably or unreasonably, shall exist at all—pretended to outlaw what plainly exists in every field of enterprise and plainly must exist so long as it is not unreasonably exercised. In other words, the currents of " law " and " fact " respecting monopoly and combination, instead of running side by side as they should run, took to running in opposite directions. When I go to my tailor for a suit of clothes I expect him to fit me, not that he cut me down or fill me out to fit the clothes—it is the surgeon only who cuts into growth. The law is a garment and should be made to fit enterprise wherever enterprise is not hurtful—

enterprise not hurtful should not be trimmed to fit the law. It was inevitable, I repeat, that this should be stopped some time by somebody. Economic evolution, the product of millions of contributing causes, is a growth as certain and irrepressible as any growth in the natural world; the law can no more *artificially* change this growth than it can paint the lily or give another fragrance to the rose.

To illustrate what such artificial interference with economic evolution means, let me suppose the case of a combination dealing in a commodity that grows everywhere—that cannot be monopolized by the process of getting under one control all the sources of production. The *combination*, let us say, is clearly proven—it has its purchasers in every section where the commodity grows and its sellers in every market where it is sold.

But the *price to the producer* is not reduced. On the other hand, it is increased; and more than that, it is steadied—the abrupt fluctuations of the old haphazard methods have disappeared.

The *cost to the consumer* is not increased. The consumer pays no more, pays less, in fact, than he would pay under the old unorganized method of purchase and distribution.

The *quantity* of production is not reduced. On the contrary, it is increased, because organization has increased consumption. Trade, as "trade" is generally understood, instead of being restricted is expanded.

Now add to this another element, unfortunately not now the fact (the previous elements are facts in many of the big combinations in the country), the *number of people* who get a profit out of the business is not reduced; the combination has as its *stockholders* those who otherwise would be the individual *competitive* dealers.

None the less, even though this last element were the fact also (and the Sherman Act will never contribute an iota to making it the fact) the combination supposed, under the Sherman law as previously interpreted, would be unlawful. In other words, though production as mere production is not restrained, rather increased; though the quantity of commodity dealt in is not restrained, rather increased; though the producer is benefited; though the consumer is benefited; though the profit there is in the business of buying and selling is as widely distributed among the people as before; though all these things are true so that economically

the combination is a benefit, it was none the less unlawful. *Why?* Solely because by utilizing organization to cut down expenses and waste, the organized industry *can afford* to pay the producer more, *can afford* to sell to the consumer at a less figure, can outrun, in the matter of cutting down cost, individual competition in the race from the producer to the consumer, *thereby* obtaining the business. In other words, the combination was unlawful because, and solely because, *inherent in organization* are these economic advantages.

In no place was the misplacement of the Sherman Act as previously interpreted more clearly exhibited than in its application to the railroads of the country. Carriers, as already stated, are natural monopolies. In the matter of rates, they are subject to the will of the Interstate Commerce Commission, the State commissions, and the courts. Active competition under such circumstances is simply waste, to be made up afterward, if it is made up at all, by excessive rates. It is enough that to these carriers the State says: "You must not charge excessive rates, nor discriminate between people, nor between localities, nor give inadequate service." The commandment is reasonable and is sufficient and plainly is, "Thou shalt not." But how shall the carrier obey this command? Like the putting together of an old-fashioned stove-pipe—successfully hammered out here only to find out that it no longer fits there—the making of rates that are reasonable and non-discriminative is a difficult and complex matter. In a country as expanded as this, with cities and localities served by as many different railway lines as serve some of our cities and localities, this fixing of rates that are reasonable and non-discriminative requires conference. The natural thing is to confer. But turn over the page of the statute-book on which you have been reading the Interstate Commerce Act. On that next page is the Sherman Act. That as previously interpreted runs, "Thou shalt not confer." And it availed nothing to say that the two commandments were in contradiction of each other—that one could not be obeyed without violating the other. "Thus saith the law" was the answer—let the bewildered carrier find his own way out.

The practical result of the Sherman Act as previously interpreted was that not only the carriers of the country and the so-called big trusts of the country, but nearly every business of every character was put literally "under the

condemnation of the law." Nearly every business movement with spirit in it became a national sin. And there was no escape from the wrath to come, except to make one's peace with the executive authorities at Washington. Of course no President or Attorney-General ever wished to bring havoc to business. No mere self-seeking President or Attorney-General would wish to bring havoc to business, for that would be to drift against Charybdis on the one side of the political channel to be sailed. There was never a day, therefore, that the law was executed, or that any one intended it should be executed, against *all* who fell literally under its condemnation. But on the other side of the political channel to be sailed is always the Scylla of a natural public hunger that somebody be prosecuted. And right there the right kind of a political pilot could show his usefulness. In other words, the Sherman Act as previously interpreted put the question of who should be made to feel the condemnation, and who should be exempt—all, literally, being under one condemnation—within the discretion of the political branch of the Government. Who should be punished for violating the law was a province transferred from the courts to the Executive; and the transfer, unobserved as it was, was nothing less, as some one—Judge Lacombe, I think—has already said, *than revolution in every ideal of English and American jurisprudence.* This latest interpretation of the Sherman Act, in determining that the restraint of trade must be unreasonable to be within the prohibitions of the act, restores the question of punishment to the courts, for hereafter the reasonableness or unreasonableness of the restraint will be a judicial question to be determined by the courts. This latest decision is *the counter revolution.*

One word more. From the view-point of the business man and his lawyer it is plain that the Sherman Act, even as now interpreted, is still not definite; that no business foresight can discern what restraint of trade incidental to business may be held by the courts to be reasonable and what unreasonable; that every push of enterprise forward is to enter upon uncharted waters. And to a certain degree this is true. But it is likewise true of other liabilities prescribed by the law, such as "reasonable care" in one's relations to the safety of others, or what is called fair dealing or fraud in one's dealings with others, for in the nature of these and many other obligations laid upon men the definition must

be general; no wisdom could devise particular definitions in advance that would meet a tithe of what is bound to happen. And it seems to me no greater hardship here than elsewhere that men who enter these fields should exercise their light of reason honestly on matters under contemplation or take the consequences. The business man who will study the effects of his contemplated acts upon the rights of others, as free from the mists of self-interest as he studies the effects of the acts of others upon his rights, will not be in any great danger of being misled into disobeying the law.

On the other hand, there is a growing consciousness that modern economic methods and tendencies are chiefly in the interest of the *special* man. Where will the ordinary man be left, in his relation to those living interests that immediately environ him — food, clothing, shelter, means to educate his children, a share in his country's growing property—where will the ordinary man be found when this new age once permanently settles into form? That the ordinary man, at every step he tries to take toward a personal independence, has to yield up from his day's wage to some of these combinations, as the price of his right to live, more than they are justly entitled to take, no one doubts. That the whole field of corporate investment is permitted to be so set with pitfalls that what the ordinary man succeeds in saving cannot be profitably invested with safety, no one can doubt. The special man is safe. But where will this new age leave the ordinary man in those personal interests that are closer to him than anything else in life?

From the view-point of a large number of those to whom this inquiry is a matter of deep concern, perhaps a large majority yet, the Sherman Act, as it now stands interpreted, will look like a gun from which the load has been extracted. As a *weapon* it will look dismantled. As a mere weapon it *is* dismantled. If in the interests of the ordinary man these modern economic methods and tendencies must be overhauled and destroyed—if union of effort and capital solely because it is effort and capital *in union* must be circumvented—this latest decision has drawn the load of the only gun thus far trained against the enemy. But it was a gun, that whatever the terror of the explosion, never fired anything other than blank cartridges. And in the development of ways to secure to the ordinary man his rights in the world in which he lives this formidable-*looking* weapon, dismantled

and abandoned, is of infinitely greater service than when in fruitless action, for though it accomplished for the ordinary man nothing that really counted, it kept him and those who have his interest in mind from looking elsewhere for immediate means against existing wrongs. Indeed, the paramount benefit of this latest decision, to my mind, is that it will bring the public mind to discern that we *are* in a new age in which combinations and monopolies even are economic necessities; and that being here, as the necessary economic equipment of the times, the thing to do with them is not to train guns on them as if they ought not to be here at all, but to so safeguard them as forms of investment and so limit them in dividends allowed to be paid (their rights are State given only, not the rights of natural persons) that they will have no motive to deal otherwise than fairly with the people, and will become also, as property investments, representative of the people. Why should we continue longer to waste our energies in trying to undo what is ordained by an economic law as inexorable as any law of nature; why not, on the contrary, lay hold of it, utilize it, and broaden it, to the highest uses of mankind, just as scientists and inventors have laid hold of the laws of nature, utilizing them and broadening their use, until they have become the common possession of mankind. It is just here —the clearing of the ground for intelligent progress in behalf of the masses—that this decision is an *event—a turning event* in the life of the nation. PETER S. GROSSCUP.

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## "THE REASON"

BY WILLIAM J. BRYAN

THE decision of the United States Supreme Court in the Standard Oil case—and the language of the opinion is repeated with emphasis in the Tobacco case—is epoch-making, although people will differ as to the character of the epoch which it ushers in. There are a number of things that impress one as he reads the majority and minority opinions, and the impression made is so deep that feeling increases with contemplation. It is easier for the public to discuss the subject in diplomatic language now than it will be when the far-reaching effect of the decision is fully understood. The position one takes in regard to the majority and minority opinions depends largely upon the point of view from which

he looks at the trust question. Those who regard the trust as a benevolent institution, or as a natural and necessary economic development, will be likely to approve of the position taken by the majority of the Court, and if they approve of the position taken by the Court they will quite naturally indorse the reasons given. Those, on the contrary, who look upon the trust as a real menace to economic independence and to our political institutions will applaud Justice Harlan for having so vigorously dissented, even though in dissenting he stood alone.

Let us consider the position taken by the Court and the language in which the Court's position is stated.

First: The opinion was written by Chief-Justice White, and no one can fail to note the tone of triumph that runs through it. It exhibits something of the spirit of the "Battle Hymn of the Republic," "Be swift, my soul," "Be jubilant, my feet." But the Chief Justice can be excused for betraying something of the exultation of the conqueror. Judges are merely human beings, if in saying this I am not guilty of contempt—that is, "unreasonable" contempt—and we must expect to find in them some of the faults that appear in common clay. Fifteen years ago the Chief Justice, then Justice White, wrote the dissenting opinion in the Trans-Missouri Freight case, and in that opinion, in which three other justices joined him, he set forth the same doctrine that he presents with so much emphasis in the Standard Oil and Tobacco cases. His achievement in converting a minority into a majority is being loudly praised by those who agree with his conclusions. Even so conservative a journal as the Springfield (Massachusetts) *Republican* says:

> "How can we give a second place to Chief-Justice White, whose great achievement in bringing a long and sharply divided Court into practical unity on the famous statute of 1890 elevates him at once to the very first rank among the country's great judges, and makes him comparable with Chief-Justice Marshall alone in his demonstrated powers of judicial leadership,"

although the friends of the Chief Justice may think that this literary bouquet is robbed of some of its fragrance by the fact that the aforesaid journal refers to Justice Harlan as the "noblest Roman of them all."

The spirit of the successful gladiator oozes from the opinion—so much so that Justice Harlan in his oral opinion in the Tobacco case protests against a seeming reflection upon

the distinguished jurists who joined in the opinion of the majority of the Court in the Trans-Missouri Freight case. Justice Harlan is quoted as saying:

"No one is more ready than I am to concede the ability of this Court as it is now constituted, excepting, of course, only myself. It never was stronger in all of its history than it is now perhaps; but I would be slow, as a member of this Court, on or off the bench, to say that such men as Melville W. Fuller, David J. Brewer, Henry Billings Brown, and Rufus W. Peckham did not know what the rule of reason was when they decided the Trans-Missouri Freight case and the Joint Traffic case. This Court was never stronger than it was on that day. It never had four men upon it that were wiser in the knowledge of the law and of the Constitution than the four men whom I am now mentioning, and yet we are told here to-day, as we were told in the Standard Oil case, that this Court decided those cases, great as they were, without any regard to the rule of reason. I think that those men knew what reason was, and knew what the light of reason was, and intended to apply reason; but we are so wise in this day and generation that we are prepared to say that our predecessors did not know what reason was, and decided cases of vast importance without any regard to the rule of reason. Others may say that; I won't."

Second: The next thing that impresses the reader of the opinion written by the Chief Justice is that "the rule of reason," which is presented as a great discovery, was not discovered by the Chief Justice, although he is its most distinguished exponent at this time. It was really discovered by those who were violating the law and was presented by the very learned counsel who attempted, at that time unsuccessfully, to convince the Court that the Anti-trust law did not mean what it said, or at least did not say what the Court, after a long hearing, declared that it did say. It does not detract, however, from the prestige of the Chief Justice that he was not the first to think of inserting the word "unreasonable" in a criminal law. The inventor is very often lost sight of—the man who makes the invention a success is the one who becomes known to the public—and the attorneys who attempted to use the word "unreasonable" as a shield to protect the defendants in the Trans-Missouri Freight case and later in the Joint Traffic Association case will have to content themselves with such consolation as they can obtain from the consciousness that they made the discovery (and from their fees), while the Chief Justice bows and smilingly accepts the plaudits of those who desired the repeal of the criminal part of the Anti-trust law and a paralysis of its usefulness in the civil courts.

Third: The fact that the Chief Justice has now with him

all of the new members—those who have come upon the Supreme bench since " the rule of reason " was promulgated by him fifteen years ago—suggests an inquiry which, however interesting, cannot be answered—namely, *why do all of the new judges concur in what was at first the opinion of a minority?* Why is Justice Harlan, the only survivor of those who joined in the majority opinion fifteen years ago, the only dissenter to-day? If it was due to the persuasive powers of the Chief Justice, why is he so much more successful than he was fifteen years ago? If it were proper to assume that judges were appointed to the Supreme Court *because of their known views upon important questions,* it would be easy to explain the change in the Court, for the judges are appointed by the President, and it would not be difficult for a President to select from the large number of well-qualified lawyers those who held a particular view on an important question. Some influence might be exerted in the selection of judges, even without actual knowledge of their views on a particular subject, if the general sympathy of the applicant was known, his bias for or against a certain class. It is no reflection upon a man to say that he possesses one of the biases which run through society, the aristocratic and the democratic biases being the most fundamental. The plutocratic bias is also a fact to be dealt with, and a very important fact, too. A man is often unconscious of the bias that he has, and the bias is, as a rule, more pronounced in proportion as the possessor is unconscious of it; and it is more likely to influence him, too, when unconscious. If a man is conscious of a bias for or against a certain class he is on his guard, and in his effort to overcome it he may lean to the other side; it is the man who is unconscious of his bias who is likely to go to an extreme, and that, too, with perfect honesty of purpose.

Opinion on the trust question is largely a matter of bias; it is a question for the heart as well as the head. It is a poor head that cannot find reasons for doing what the heart wants to do. It is a fundamental " rule of reason " that a man can generally find a reason—not always conclusive and sometimes not even plausible, but a reason sufficient for himself—for doing anything upon which his heart is really set. If bias is admitted—bias in the President as well as in the judge—it is entirely possible that a President might unconsciously select judges who would, without any pre-

vious pledge, agree quite naturally with those who represent their side of the great fundamental issues that divide society. If it "just happened" that in the selection of eight judges *all* should take the view of Justice White, and if it is *not* accounted for by bias on great subjects, then it shows what a lottery is conducted at the White House when the President blindfolds himself and picks judges at random, only to find that all the prizes have gone to those who do not fear "reasonable" trusts and none to those who oppose all restraint of trade.

Fourth: Another thing that strikes one as he studies the opinion of the Court is that the Court's decree is entirely lost sight of in the reasons set forth. The Court decided that the Standard Oil Company (and also the Tobacco Company) violated the law, and it ordered a dissolution. But even the defendants did not seem to regard the order as of any serious moment, while the reasons given by the Court have aroused the entire nation, and this submerging of the immediate result is the more remarkable when it is remembered that the language which has startled the country *was not necessary to the decision of either case.* Justice Harlan calls attention to this fact quite pointedly. In the oral opinion delivered in the Tobacco case he said:

"More than that, and still more than that, it is a very serious matter. What does it matter, so far as this case is concerned, whether that act of Congress contains the word 'reasonable' or does not contain the word 'reasonable'? We all agree—every man on this bench agrees—that this is an organization in violation of the act of Congress, whether the 'reasonable' is or is not in the act. It is a violation of a law of Congress. Then why could not this Court have said, under these facts, 'This corporation violates a law of Congress' and stop there—and stop there? Why was it necessary for us to go into an elaborate and ingenious argument, worthy of the genius of the Chief Justice, and attempt to show that this act should be interpreted as if it contained the word 'reasonable' or the word 'unreasonable'? Whether it contains those words or not is of no consequence in this case under this act. If there ever was a case since the organization of this Court in which a vast amount of an elaborate and able opinion is pure *obiter dicta—obiter dicta* pure and simple—it is the opinion delivered by the Court in this case as to the construction of this Anti-trust Act of 1890. I cannot escape that conclusion."

As Justice Harlan well says, in order to find the defendant companies guilty it was not necessary for the Court to discuss the question of reasonableness or unreasonableness, for in both cases the Court decided that the defendants were guilty even if the Anti-trust law were amended so as to pro-

hibit not every contract in restraint of trade, but only contracts that unreasonably restrain trade. The Court might have met the arguments of counsel for the defendants by saying:

"The question which you raise is immaterial and irrelevant. It is not necessary for us to decide whether the defendants would be guilty if the statute were construed according to the contention of the government. We may assume for the purposes of this case, without deciding the question on its merits, that the law reads as you say it ought to read, still defendant companies are guilty of not only unreasonable restraint of trade, but of outrageous and inexcusable restraint of trade. They cannot hope to escape under any construction of the law. In finding against them, however, it is not necessary for us to consider hypothetical cases. We are dealing with the cases before the Court. These defendants are undoubtedly guilty. They are guilty of clear and unmistakable violation of the law, and they cannot escape the consequences by questioning the language of the statute; they would be guilty if we construed the statute, as they ask, to prohibit only unreasonable restraint."

The Court might have said this, and if it had done so it would have been acting in harmony with precedent; but instead of doing this the Court goes out of its way to interpret the law, not for the benefit of those then before the Court, but for the benefit of those who may hereafter be brought before the Court. The public recognizes that the decision is important, not because of its effect upon the Standard Oil Company and the Tobacco Company, but because it furnishes a new interpretation of the law—an interpretation that brings a smile to the face of every trust magnate, but arouses deep concern in the breasts of those who regard a private monopoly as indefensible and intolerable.

Fifth: The decision of the Court is so revolutionary that it not only reverses a decision that has stood for fifteen years, but it amends a law, enacted by Congress, which the Court refused to amend in the Trans-Missouri Freight case. It is true that Chief-Justice White, then an associate justice, dissented, but according to our law the decision of the majority of the Court stands as the decision of the Court—even when that majority rests upon the opinion of one justice; and to make it stronger still, even when the opinion of that justice has changed between two arguments of the case, as did the opinion of one of the justices in the Income Tax case. It is no slight matter for the Supreme Court of the United States to reverse itself upon an important question, because a reversal cannot but affect rights based upon

the former decision and interests built up upon that decision as a foundation. But the reversal of a former decision is the more serious when such reversal involves an encroachment upon the legislative branch of the government. Justice Harlan in his dissenting opinion very properly calls attention to the language of the Court when this identical question was before it in the Trans-Missouri Freight case. He quotes the following from the decision in that case:

"To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of unreasonableness to the companies themselves. But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration. The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances, we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. If the act ought to read as contended for by defendants, Congress is the body to amend it, and not this Court by a process of judicial legislation wholly unjustifiable."

It will be seen that the Court at that time not only refused to amend the Anti-trust law by inserting the word "reasonable," but declared that it had no constitutional right to do so. The Court now does the very thing which the Court then declared to be unconstitutional. What higher condemnation is there than condemnation spoken by the highest Court of our land? Of course the last decision supersedes any former decision. If the Court declares to-day that the insertion of the word "unreasonable" in the Anti-trust law would not be judicial construction, but a legislative act prohibited by the Constitution—if the Court decides that to-day, and next year a new set of judges reverse the decision, the new decision would stand as the supreme law of the land, but it would not lessen the moral weight of the former de-

cision. The Court which decides that it has no right to exercise a certain power—thus deciding against itself—must have weight with an unprejudiced mind, even though the Court, composed of different judges, decides later that it possesses the power formerly denied. We understand the natural tendency to enlarge upon one's powers—a tendency from which courts are not entirely free, and we cannot at once rid our minds of the impression that the opinion of the former court deserves careful consideration.

Under our Constitution the Court has the final word as to a law, and the only way in which the public can protest against judicial legislation is through the legislative branch of the government. While the Constitution divides the Federal Government into three branches, each independent of the other, it gives to the Supreme Court the power of interpretation, and this transcends for the time being the powers vested in the Legislature. But the people are not mocked; they can by legislation restrict the construction of the Court and prohibit a construction which will nullify a statute.

Then, too, the people can reach a Court through the changes that are constantly occurring in the personnel of the Court. It would have been difficult fifteen years ago to conceive of such a change in the Court as would result in an eight-to-one decision overruling the decision of that date, but, since such a change has taken place, it is possible to conceive of another change during the next fifteen years that will bring at least a majority of the Court back to the rule that prevailed before the so-called "rule of reason" took violent possession of the Court. It is possible also that Congress may see fit to express its disapproval of the construction placed upon the Anti-trust law by the Court in the Standard Oil and Tobacco cases. It may see fit to pass some of the bills already introduced by specifically declaring that the law prohibits all restraint of trade—not merely unreasonable restraint.

While I think that this ought to be done in order that the present law may not be robbed of such strength as it possesses, such legislation should be accompanied by further legislation that will fix arbitrarily the percentage of the total product which one corporation can control. The law as it formerly stood and as it was previously construed was uncertain enough—it was difficult for a corporation to know exactly what it might or might not lawfully do, but

this uncertainty is greatly increased by the insertion of the word "unreasonable." The Democratic platform of 1908 set forth a remedy which would, in the opinion of those who urge it, afford substantial relief to the public without doing injustice to any corporation. The platform plan contemplates the licensing of any corporation engaged in interstate commerce when that corporation controls as much as twenty-five per cent. of the total product; corporations controlling a less proportion would not be affected by the plan. Corporations taking out the proposed license would be subject to any restrictions that Congress thought necessary to the proper conduct of their business as well as to the laws of any State in which they did business, and no corporation would be permitted to control more than one-half of the total product. We should have this additional legislation clearly and specifically drawing the line between the corporations engaged in legitimate work and the corporations which are engaged in unlawful transactions. Such legislation is demanded in the interest of the public and in the interest of legitimate business as well. It is not right to assume that any large percentage of our business men desire to engage in transactions which are harmful to the public, and those who are engaged in intentional wrongdoing should be segregated and subjected to punishment. Legitimate business has too long had to bear the odium thrown upon it by those guilty of conduct indefensible in morals as well as repugnant to the letter and spirit of the statutes.

Before passing from this branch of the subject, it may be worth while to inquire whether the Court, in entering upon judicial legislation, does not encourage those who favor a change in the method of selecting judges. Whatever may be said in favor of the appointment for life of men engaged in *interpreting* the law, no good reason can be given for the appointment, especially for life, of a *legislative* body. Nothing is more abhorent to our institutions than an appointive legislative body. Even the United States Senate is elective, and its members hold office for a specified term, and yet the sentiment in favor of popular election is so strong that we are upon the eve of a change which will make Senators elective by direct vote of the people. If the Supreme Court is to become a legislative body, what reason can be given for not making it elective also? The people

would submit much more willingly to judicial legislation if they had a chance to elect the judges for fixed terms. Will they consent to legislation on important questions by a Court whose members are not only *appointed* by the President, but appointed *for life?* Justice Harlan thus answers the question:

"Nobody can tell what will happen. When the American people come to the conclusion that the judiciary of this land is usurping to itself the functions of the legislative department of the Government, and by judicial construction only is declaring what is the public policy of the United States, we will find trouble. Ninety millions of people—all sorts of people with all sorts of opinions—are not going to submit to the usurpation by the judiciary of the functions of other departments of the Government and the power on its part to declare what is the public policy of the United States."

Sixth: Attention has been called to a number of questions raised by the decision of the Court, but there is one point which, above all others, challenges the attention of the public at this time. What will be the effect of the Court's decision on the statute which it *construes* (to use its language) or (to use the language of the dissenting justice) *virtually repeals?* The Anti-trust law of 1890 reads: "*Every* contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, etc." The Court declares that the statute should be constructed (or amended) to read: "Every contract, combination in the form of trust or otherwise or conspiracy, in *unreasonable* restraint of trade or commerce, etc." Of one thing there is no doubt—namely, that this construction or amendment of the law excludes from the penalties of the act *some* corporations that might, by the construction placed upon it fifteen years ago, be found guilty of a violation of the law. That is, it *lessens* the number of corporations to which it applies, and to this extent *weakens* the law as a protection to the public.

To understand this decision we must remember that after the decision of fifteen years ago the great corporations attempted to secure an amendment to the law *exactly in line with the present decision.* While this effort has been continuous, it is only necessary to refer to the attempt cited by Justice Harlan in his dissenting opinion. This instance is used not only because it is a recent attempt (made in 1909), but because the Judiciary Committee of the Senate

filed an elaborate report, setting forth the reasons why the word "unreasonable" should not be inserted in the law. No one will accuse our Senate of being *unreasonably* hostile to big business interests even to-day, and it was still less hostile two years ago. The changes that have occurred during the last two years have very considerably increased the number of Senators who are opposed to the trusts and opposed to the control of industry by them. Yet even two years ago the Judiciary Committee of that body expressed its disapproval so vehemently that the attempt to change the law was abandoned.

The report submitted by the Judiciary Committee at that time ought to be read by every one who desires to acquaint himself with the subject under discussion. It pointed out the absurdity of using as precedents cases which dealt with contracts between individuals and which affected themselves only. Even one not learned in the law can understand that a contract should be construed more strictly against those who make it than against those who are not parties to it. A contract by which one agrees not to engage in the same business under certain conditions is to some extent a transfer of the good-will of the business. An entirely different rule ought to apply where two or more parties enter into a contract to drive a third party out of business. Justice Harlan quotes as follows from the report filed by Senator Nelson, Chairman of the Judiciary Committee:

"The Anti-trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute *indefinite and uncertain,* and hence, to that extent, *utterly nugatory and void,* and would practically amount to a *repeal of that part of the act.* And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case, and there would be as many different rules of reasonableness as cases, courts, and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable. In the case of the People *vs.* Sheldon, 139 N. Y., 264, Chief-Justice Andrews remarks: 'If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agree-

ment was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.' To amend the Anti-trust Act, as suggested by this bill, would be to entirely *emasculate* it, and for all practical purposes render it nugatory as a remedial statute. Criminal prosecutions would not lie and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, certain, and highly remedial. It practically covers the field of Federal jurisdiction and is in every respect a model law. *To destroy or undermine it at the present juncture, when combinations are on the increase and appear to be as oblivious as ever of the rights of the public, would be a calamity.*"

I beg to submit that there is no escape from the logic of the language used. A light that would lead one to ignore the arguments, submitted by Senator Nelson and quoted with approval by Justice Harlan, is not the light of reason. A rule that will divide crimes into reasonable crimes and unreasonable ones is not a rule of reason, no matter how many judges may concur in its enunciation. The Anti-trust law as recently construed by the Court is no longer a criminal law, and as a civil statute it is badly crippled. No wonder the corporations that are now being prosecuted under the law have immediately enlarged their defense so as to deny the unreasonableness of the restraint of trade which they are attempting. The Court has multiplied the difficulties under which the Government prosecutors will labor, even when they commence civil prosecutions, but can the Government hope to convict trust magnates of crime under the law as now constructed? In crime the intent is everything, and the accused is entitled to the benefit of every reasonable doubt. What trust magnate could be convicted of criminal intent (with every reasonable doubt resolved in his favor) to *unreasonably* restrain trade when there is no legal definition of unreasonable restraint? Justice Brewer, speaking for the Court in Tozer *vs.* the United States, 52 Fed., 917, said:

"But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Company *vs.* Dey (35 Rep., 866, 876) I had occasion to discuss this matter, and I quote therefrom as follows: 'Now, the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate it shall be deemed a criminal, and punishable by fine, and that such a statute is too indefinite

and uncertain, no man being able to tell in advance what in fact is or what any jury will find to be a reasonable rate.' If this were the construction to be placed on this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

In the light of this decision, who is likely to be convicted of a criminal violation of the Anti-trust law? We may as well recognize that *we now have no criminal law against the trusts.* Whatever is left of the Anti-trust law — the only protection against monopolies for twenty-one years—must be enforced as a civil statute, and of what value is that when it requires four and a half years to reach a decision which, when reached, is of but little value when applied to another case? According to the decision of the Court, each case must now be decided upon the facts which it presents, the reasonableness of the restraint being a mere matter of opinion, and, as the value of testimony depends as much upon the manner of the witness as upon what he says, the court deciding upon a printed record may reach a very different conclusion from that reached by a court or jury having living witnesses before it.

If one would understand the effect of the Court's decision on the Anti-trust law, let him apply it to other criminal statutes with which he is more familiar. What would the statute against larceny amount to if it only prohibited "unreasonable" stealing? Or the statute against burglary if it did not prohibit burglary except when carried beyond a "reasonable" extent? What protection would there be in a law against assault and battery if it prohibited only "undue" beating? The average man will regard the report of the Senate Judiciary Committee above referred to as a much more reasonable document than the decision of the Supreme Court, and the opinion of the average man as to what should constitute a crime is an opinion that must be taken into consideration even by the Supreme Court, for in the United States the opinion of the average man sooner or later becomes the law of the land and the controlling force in government.

Seventh: And what shall we say of the Court's action in allowing six months for reorganization? If the defendants have been guilty of violating the law for twenty years, why should they be allowed six months in which to continue to

violate the law while they perfect a new combination? In the Tobacco case Justice Harlan protests with feeling against the time given to the defendants, who are, by the decision, declared to be open and notorious violators of the law. He says, "I find nothing in this record from beginning to end that makes me at all anxious to perpetuate any combination among these companies."

Is it not a little strange that such consideration should be shown to men whose crimes are so enormous? If men of less wealth were involved, would the Court hesitate to enforce the law immediately? If the defendants have violated the law—and they could only be convicted upon the theory that they had violated the law—can the Court suspend the law as to them or grant them immunity in advance for future violation during a given period? Nothing can do more to encourage anarchy — no better material for anarchistic speeches can be furnished—than judicial decisions that deal leniently with great offenders. Equality before the law is not the doctrine of the demagogue. Those who believe in it are not disturbers of the peace, nor are they attempting to array class against class. Equality before the law is a fundamental doctrine of free government, and it cannot be disregarded with impunity by any court, however high. It is of the utmost importance that our courts shall deal with the great criminals as they deal with small ones; a man who steals a pocketbook is a violator of the law and deserves punishment, but he is no more a violator of the law than one who conspires against ninety millions of people. To visit swift condemnation upon the poor and friendless and to grant indulgence to the rich and powerful shocks the sense of justice which God has planted in every heart—that sense of justice which is the only foundation of free institutions.

Eighth: The last question to be considered is, what is to be the result of this decision? We have seen one result—namely, rejoicing on the part of every man pecuniarily interested in the corporations which are exploiting the public. But what will be the effect upon the public? This question cannot be answered without entering the realm of prophecy, and prophecy is uncertain. We have seen one decision of the Supreme Court—the decision in the Dred Scott case—hasten a civil war, and we have seen another decision—the decision in the Income Tax case—compel the submission of an amendment to the Constitution. We shall see, as times goes on,

whether the people will acquiesce in this decision or be aroused by it to more energetic action against combinations in restraint of trade, and the result will have its effect upon the reputations of the members of the Court. If the revolution which Chief-Justice White has led marks the beginning of a permanent policy he will be accorded a high place among our jurists. If, on the other hand, public sentiment develops along the line of the dissenting opinion we may expect to see Justice Harlan increasingly honored. If his warning is heeded and the people assert their right to protect themselves against trusts and monopolies he will become the forerunner of a great reform, while the flame which the Court mistook for " the light of reason " will be discarded as an illusion.

WILLIAM J. BRYAN.

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## THE EFFECT

BY JOHN LARKIN

WHEN the people of the country returned to peaceful pursuits after the Civil War competition was unrestrained, unreckoning, and lawless. To secure increased trade or following from the wreck of a business rival was the object of corporation and individual. Victory by such method was always at great loss and frequently barren and destructive to the victor. If unrestrained and unlimited competition be the panacea for economic ills, that medicine was tried and found ineffective.

Such victory was hardly worth while, and the orgy of reckless competition was followed by the broader view that limits should be set to acts of competition, that reasonable fairness should exist even in the warfare of business, that territories might be allotted for development, that working agreements might be made in the nature of a truce from time to time, and that co-operation might even take the place of competition. Combination of former rivals and competitors followed, by which available capital was increased, waste reduced, and alert minds were permitted to concentrate upon developing new channels for business enterprise rather than upon new methods to destroy their competitors. Success followed these methods; stockholders received fair returns upon their investments; further capital was easily found to develop the untouched resources and territory of the country; great railroad systems were built

up from insignificant units with beneficial results to the public in the way of better service and greater convenience. The idea of combination and co-operation of business was seized upon by great minds and applied in a large way. The combinations thus developed became giants in power.

The immediate result of these great organizations was beneficial to the public. Freight and transportation rates became lower and industries products as a whole cheaper. Nevertheless, many thoughtful citizens viewed these great aggregations of capital and energy with misgiving: they were becoming too powerful; they were in business, in politics; they were in the Legislatures; they were here, there, and everywhere, and they never slept. They were to be feared; they were secretive; they moved in strange ways; they could not be seen nor talked to and they never talked back. The idea spread with amazing rapidity and virulence. All such combinations were declared bad. Congressional and legislative investigations followed of the methods used by some, and all were found guilty of high-handed and lawless acts in the development of their enterprises. Something should be done to shear them of their too great and threatening power.

So in July, 1890, the Sherman Anti-trust Act became a law of the United States. Congress enacted in the first clause of that act that " every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce amongst the several States or with foreign nations is hereby declared to be illegal." Sweeping words, but what did they mean? What was meant by " restraint of trade "? The statute did not define the words and their meaning had to be sought in decisions by the courts. In those decisions the words " restraint of trade " had a well-understood and definite sense.

Economic conditions repeat themselves, and the efforts to correct economic troubles are numerous and of record. As trade and commerce are the life-blood of a peaceful people, anything which interferes with its proper circulation must result disastrously; the energy of a people must have proper channels for expression, otherwise less innocent ways will be found for its outlet; anything which restrains trade and commerce should be rebuked and made void for the public good. This is the argument against restraint of trade. What does restraint of trade mean as defined by the courts

almost from time immemorial? The typical case was where one was engaged in a trade or calling and made a contract no longer to do so; such contract was declared to be contrary to public policy and void; he was guilty of restraining trade. If several joined in the same agreement it was a conspiracy affecting the public good and could be dealt with criminally; it was considered the duty of a citizen to work at his trade or calling and not to become a public charge; he owed this duty to himself and his family and in a larger sense to his country. Now the trusts had not been restraining trade in that sense; possibly they had made contracts here and there which were, or could be construed as, in such restraint; but such contracts were incidental, unimportant relatively, and the misgiving about the corporations were not due to them. Far from restraining trade in any such sense, the corporations were, on the contrary, diligently, if sometimes ruthlessly, *extending* their trade far and wide at home and abroad, in season and out of season, with tireless industry; they were adding to the wealth of the country by the creation of products purchased by consumers throughout the world; their competition was felt by those engaged in the same field of work, and their energy affected adversely the trade of their competitors. But otherwise they neither actually nor technically restrained trade. Moreover, the first clause of the act assumes the legality of trusts and combinations; they were not declared to be unlawful, nor were they prohibited from engaging in interstate commerce. Nor does this clause of the act say anything about competition or directly or indirectly forbid contracts in restraint of competition; the words used are "contracts in restraint of trade." There is nothing in the act to prevent contracts not to compete nor to enter into competition for trade and commerce. So the first clause of the statute forbids something that the corporations had not been doing and does not forbid what they had been doing in competing.

The second section provides that every person "who shall monopolize or attempt to monopolize," or "combine or conspire with any other person or persons to monopolize, *any part* of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor." Thus we are confronted by the first section, which declares any contract limiting trade is illegal, and by the second, which makes an undue increase of trade a misdemeanor.

This juxtaposition of the sections does not make the meaning of the act any clearer.

The statute does not define monopoly, and reference must be made to history for the meaning of this word. Examination shows that a monopoly could only arise from a grant by a sovereign power to a person or special group of persons to do something which before had been enjoyed in common. There is nothing of that character here. The combinations, trusts, corporations, or whatever they may be called had no grant of a monopoly or exclusive right to do anything. The monopoly charged against them is that they did more business in their special line than any other of their competitors. This privilege was inherent in every individual and in every corporation. The words of the statute cannot, therefore, be read literally. No condition existed to which the statute could refer if the words were taken literally and in their accepted meaning, for what had been done by these combinations or trusts any citizen or group of citizens could have done. There was no grant or special privilege conferred by the sovereign power upon any particular man or group of men of greater rights than were already inherent in any and every citizen of a State.

Whatever else these combinations did as a matter of everyday knowledge, they did not restrain from trading, nor did they refuse to engage in trade or commerce; nor did they conspire with any one not to develop their trade or commerce. If there was any conspiracy it was to advance their trade and business by every possible method.

The statute, in brief, says that no person shall attempt to restrain interstate trade nor shall he attempt to monopolize any part of it, under penalty of fine and imprisonment. By necessity any railroad becomes a partial monopolizer of commerce when it lays its tracks in a certain territory. An industrial enterprise becomes a partial monopolizer when it establishes its factory to supply a given territory.

To give effect to this statute so that the public will might be enforced and yet without violating fixed principles of construction and the plain meaning of words was the problem which confronted the Supreme Court.

If it was a difficult problem for those interested in the business in this country to decide what could and what could not be done, the problem the legislative branch of the Gov-

ernment presented to the Supreme Court of the United States was much greater.

As a literal and technical reading of the statute made its application anything but clear, the Court was compelled, in order to ascertain the intent and object of the act, to go out of the act to learn what the economic conditions were at the time of its passage. The conditions which Congress had in mind were disclosed by the debates which were had while the act was in passage. From these debates it appears that the indignation of the public had been aroused by the treacherous, underhanded, and vicious acts which some of the combinations had resorted to for the purpose of absorbing the business or territory of a rival for the purpose of extending its own. The evil which the act sought to remedy was lawless competition, unfair, and unjust. Whatever the intention of the Legislature may have been, that intention, either by accident or design, was not expressed. Although the evils sought to be corrected were those arising from lawless competition, yet that word, the word competition, does not appear in any part of the act. Yet judgment was rendered against the defendants in the earliest of the trust cases and by the Supreme Court upon the very ground that competition was restrained by the agreement made; and competition being restrained, it followed as a consequence that business or trade was restrained and therefore there was a violation of the law.

There are no qualifying words such as "contrary to public policy," "against the public good," or "unreasonable," or "unlawful" in the Anti-trust Act. The words of the act were unqualified. Every contract in restraint of interstate trade was illegal. Every person attempting to monopolize any part of interstate trade was guilty of a misdemeanor. Pushed to the extreme, this meant that every corporation or individual which should acquire another business of an interstate character would to that extent be attempting to monopolize that part of interstate trade which would make the contract of purchase illegal and those interested, criminals. The relation of the business so acquired, as compared with the whole business of that character, had nothing to do with the question. It tended to create a monopoly when one corporation or individual decided to extend or enlarge his or its scope of its business.

If the corporation acquired the assets of the other, or its stock, it restrained trade to the extent that it rendered that particular corporation unable to continue in business, although the effect on the public was obviously the same if the two methods of transportation remained as formerly and at no greater expense. The Court thereupon, in the Trans-Missouri Freight case, decided in March, 1897, said in its opinion that literal interpretation would have to be given the act regardless of consequence; whether the public were benefited by the merger or contract or agreement was not the test because the power existed in the combination to affect the public injuriously, and that was sufficient whether the injury was actually worked or not. That the combination might be distinctly to the public good was immaterial if the allied companies had the power later to impose their policies upon the public to its disadvantage. And as the railroads agreed among themselves upon the rates to be charged they restrained competition, and restraining competition they restrained trade as a sequence.

The result, therefore, seemed to be a paradox, for Congress intended (as appears from the debates, although it did not by the act say so) to restrict competition within lawful bounds, while the Supreme Court said that any acts, whether beneficial or otherwise, which restricted competition were, under the act, illegal. The claim that the statute should be reasonably construed was repeated in many subsequent cases, but the Court steadfastly refused to read into the act any qualifying words whatever and adhered to its first interpretation. Then the business men of the country found that the decision might apply to them as well as to the giant combinations and commenced to interpret the Anti-trust Act for themselves. They say by the act that trusts, combinations, corporations, and mergers were not prohibited. They had learned that their success in business depended upon progressive activity, rather than by maintaining an impossible stationary condition compelled by the act as interpreted, the only way a corporation could keep itself immune from the penalties of the act. They also persuaded themselves that as their business was comparatively small as compared with the whole business of that character engaged in interstate commerce, they would not be affected, and that the law was not meant for them, but for others higher up in the business world.

The result of all of which was that the law, general in its terms and applying to all within the literal meaning of its terms, was construed by those engaged in interstate business (practically every business of any consequence) in a very practical manner as differentiating between good and bad corporate activity; between enterprises and plans which were generally good or generally bad, and between great combinations as against those of moderate size. As these points were settled in the minds of the business men of the country they continued to engage in business, satisfied that the construction then made by them was correct and that it was a good working business law. Meanwhile other cases proceeded to the Supreme Court, where were repeated the arguments that the question of public interest should be the fundamental point upon which each case should be decided; that the act should be held to be a declaration of the existing common law; whether the restraint of trade complained of was reasonable and necessary or whether it was unreasonable and vicious should be the real test.

In the cases lately decided many facts were shown which warranted the finding that unfair competition had been resorted to; that outrageous, illegal, and high-handed methods had been used to crush out competitors and absorb their former fields of endeavor. Assuming all of this to be so, the business of the country generally should not be made to suffer because some merchants have succumbed to a more intelligent business campaign or to an unlawful demolition of their trade. The remedy for the first does not exist in law, and in the second case an award for damages sustained may be had for the asking.

Again, the people of the country appreciated that unless their construction was given to the statute it would be left for the United States District Attorney to decide which business should be shut down and which should be permitted to proceed. This would depend on the character of the prosecuting attorney, his likes and dislikes. The country had never granted any such power to any prosecuting officer. In former days a judge or jury or both decided whether an illegal or criminal act had been committed, and this depended upon the acts done in pursuance of the agreement and not upon the agreement unsupplemented by overt acts.

It would be as easy to ask the sea to be still as to ask the energy and property behind the business of the country to accept in peace a reiteration of the doctrine enunciated in the Trans-Missouri case.

The inexorable logic of the decision in the Trans-Missouri Freight case was recognized by the business interests of the country and appreciated until they believed it might also apply to them. They knew so far as they were concerned that they were not injuring the public, although they believed that some other but greater combination might.

This same common-sense conclusion had also been reached by a former Chief Executive of the country who differentiated trusts or combinations as being good or bad, as beneficial or baleful, and selected for attack such as he believed to be in the latter class.

Constrained by public opinion and by the ultimate destruction of business generally if the doctrine in the freight cases were adhered to, the Supreme Court modified the construction formerly placed upon the act and declared that the " rule of reason " should be applied to it, which is the same as saying that the rule of common sense should apply. As a result the law becomes general in its application and applies to every business enterprise engaged in interstate commerce the test whether such enterprise is good or bad from the standpoint of the public good.

This construction, appealing to every one as just and fair and far-reaching, should satisfy all.

It should satisfy the great corporation or trust because it should be prepared at all times to stand or fall upon the question whether or not its activities are beneficial or hostile to the public welfare.

It should satisfy the smaller combination because its business, comparatively negligible, may not be the subject of attack by an overzealous public prosecutor.

It should satisfy every citizen because the object of the act has been attained. Danger to the country comes only with corporations of giant size whose power and wealth when combined with others make them no mean rival to the power of the country. To restrain such power and keep it within bounds was the real purpose of the Anti-trust Act.

The phraseology of the act was but a means to this end and this end has now been brought to pass.

JOHN LARKIN.

## THE RECORD

BY FREDERIC R. COUDERT

"The resolutions of the books upon these contracts seeming to disagree, I will endeavor to state the law upon this head, and reconcile the jarring opinions."

THESE are not the words of the Chief Justice of the United States in the Standard Oil case, however appropriately they might have been there used, but are taken from the opinion of Chief Judge Parker (later Lord Macclesfield) delivering the opinion of the Court of Kings Bench in a case involving a contract alleged to be "in restraint of trade" in the year 1711 (Mitchel *v.* Reynolds, 1, P. Williams). It thus would appear that for some two centuries the subject has not been free from difficulties and that jarring notes at Bench and Bar are merely healthy exuberances of free institutions in a progressive civilization.

Perhaps since Chief-Justice Taney announced the decision in the case of Dred Scott, no judgment of the Supreme Court has evoked wider interest, suscitated more controversy, and elicited greater divergence of views than that in the case of the United States *v.* the Standard Oil Company. Yet this case differs from the great epoch-making decisions of the Supreme Court of the United States, such as Marbury *v.* Madison, McCullough *v.* Maryland, the Dred Scott case itself, the Income Tax case, and the recent Insular cases, in that here no question of our Organic Law is involved. The Supreme Court was not required to pass upon any great question of constitutional or public law in pursuance of that peculiar power conferred upon it by the Constitution and which is exercised by no other supreme tribunal of any of the great nations.

The decision of the Court in the present case was in the exercise of one of the most elemental, indispensable functions of the judiciary—viz., the interpretation of statutes. In the terse and elegant English of Mr. Justice Holmes in the Northern Securities case:

"Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt." (193 U. S., p. 401.)

Human ingenuity has as yet failed to draught a law of such precision and clarity that no man can be found who is not willing to draw its interpretation into question. This calls to mind the classic illustration of the leech who was prosecuted for having bled a patient in the town of Bologna, the law decreeing that " whoever drew blood in the streets should be punished with the utmost severity." The prosecution in that case evidently believed in the strict construction of the law, but even at that ancient date the more liberal view prevailed and the case was held not to be within the intention of the lawmaker. It has been well said that the pole star of judicial construction must be the intention of the Legislature, however difficult this may be to ascertain. It is well put by Mr. Justice Swayne (23 Wall, 374-380):

" A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

That quaint old law-writer, Plowden, cites a case holding that a statute of Edward II enacting that a prisoner " who breaks jail shall be guilty of felony " does not extend to a prisoner who breaks out when the prison is on fire, " for he is not to be hanged because he would not stay to be burned."

But in ascertaining the intent of the lawmaker and the object or purpose of a statute not only the contemporaneous situation, but the historic past, will be examined to shed light upon that intention, where ambiguity or obscurity exists. A government in which there is no organ having power to determine questions arising under those general rules of human conduct which we call laws would be necessarily anarchic. This is so generally recognized that the great French Civil Code (Code Napoléon) prescribes that no judge shall refuse to interpret a statute because of its obscurity or ambiguity.

The wide-spread interest in this case is due to the fact that the question with which the statute deals — " monopoly "—has become the main political and economic problem of the day. The development of business in the United States necessarily requires that there shall be some legal rule by which the validity and legality of the large aggregations of capital shall be determined.

" Monopoly " is no new thing, nor is the dread which it at present seems to inspire peculiar to our people, for we find

that in A.D. 483 Emperor Zeno issued an edict as follows:

"We command that no one may presume to exercise a 'monopoly' of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, and if any one shall presume to practise a 'monopoly,' let his property be forfeited and himself condemned to perpetual exile. And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise, and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay fifty pounds of gold."

And to come down to more recent times we find that the Court of King's Bench in 1711 declared that:

"Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade and to reduce it into as few hands as possible."

The English and American law reports contain many cases on *combinations* and *monopolies* at the common law and all of our States have some statutory enactments on the subject, many of them of very recent date and of drastic tenor.

In 1889 the attention of Congress was called to the need for a Federal law prohibiting monopolies, and the evils of the so-called trusts were debated and denounced in considering the bill introduced by Senator Sherman, which in somewhat amended form became the famous Sherman Anti-trust Law.

The necessity for such a law, if the Federal Government intended to take any part in prohibiting monopolies, was manifest, since the Federal Courts have no common-law jurisdiction, but derive their powers from the Constitution and Congressional statutes. This must be remembered when the question arises as to whether this act was merely declaratory of the general common-law rule as laid down by the courts of England and America or furnished another and broader one.

The sections of the act setting forth the offenses aimed at are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The statute further provides for the use of the equitable remedy of injunction. While a Court of Equity has no inherent power to enjoin the commission of a criminal act, such powers may be and sometimes are conferred by statute. This act is thus endowed with a double aspect, civil and criminal. The more important cases in which the Supreme Court has passed upon it have come up by way of suit for injunctive relief against the alleged monopoly or combination, and the criminal features have been only incidentally considered.

While, technically speaking, debates may not be used as a means for interpreting a statute, yet, as the Chief Justice remarks in the present case:

"That rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of a period when it was adopted." (Op. p. 15.)

An examination of the debates makes it perfectly clear that Congress had in mind the great combinations in the necessaries of life which at that time were already exciting serious attention throughout the country. Senator Sherman evidently thought that his bill did nothing more than enact the common law which he believed amply sufficient to carry out the intention of Congress as to the restricting of monopolies. Speaking of his first draught of the bill, he says:

"It sets out in most specific language the rule of the common law which prevails in England and this country, especially declared by the Supreme Court of the State of New York in a very clear and able opinion, which I have here on my desk." (Bills and Debates in Congress relating to Trusts; Government Printing House, p. 15.)

It will be necessary to discuss further on the much-mooted point as to whether the Sherman law was declaratory, as this has been the question about which continuous controversy has raged since the passage of the act down to the time of the Standard Oil decision, which seems to have finally resolved that problem. At present it is sufficient to say that the combinations and monopolies which Congress

had in mind were, generally speaking, not difficult of ascertainment; they evidently were the great companies which had been denounced by political orators and political platforms for some time past, and it was so stated time after time in the debates.

Before discussing the merits of the Standard Oil decision I will set forth briefly what the case decided and analyze the decision, which shows that:

(1) The interpretation of the Court gives full effect to the intent of Congress, which intent must be read (a) in the light of the common law and (b) in that of contemporary history, and

(2) The controversy regarding the question as to whether or not the Court has injected the word "reasonableness" into the statute is a mere word battle or logomachy due to a misconception of the decisions that have gone before and the true meaning of the utterances of the Chief Justice, in the Standard Oil and Tobacco cases.

The bill of the United States against the Standard Oil Company, covering some hundred and seventy pages, sets forth the history of that organization and emphasizes the three phases through which it had passed. These phases were (1) the combination between individual firms prior to 1870 into a corporation known as the Standard Company of Ohio. This combination existed from 1872 or thereabouts to 1882, at which time, as the Court found, the defendants then (2) entered into one of those agreements which had come to be known technically as a "trust," by which the stock or interests in various concerns were transferred in trust to one company which acted for all. This arrangement was condemned by the Supreme Court of Ohio in a suit to dissolve the trust and thereafter (1889), (3), the company entered into its present status—viz., the operation of many subsidiary companies through the Standard Oil Company of New Jersey, a holding corporation, which had obtained and acquired a majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various States and Territories of the United States and thereby managed and controlled the same. It was this last phase which was charged as being peculiarly within the act, the earlier history of the company, especially that prior to the passage of the Sherman Law being adduced simply as evidence of a continued and definite purpose, extending over some forty years, to drive out competitors and to monopolize

the oil industry for the benefit of the small group of magnates who dominated it.

The Court holds that the two sections of the statute, that relating to " restraint of trade " and that relating to " an attempt at monopolization," must be read together and that both had been violated by the acts of the defendants. The decision of the Circuit Court, holding as an illegal restraint of trade and monopoly the combination formed by these numerous defendants and operating through the Standard Oil Company of New Jersey, was affirmed by the Supreme Court upon the following grounds, which the Chief Justice tersely sums up as follows:

" (a) Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

" (b) Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation, as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it " (pp. 31, 32 Op.).

This result is concurred in by all the members of the Court, and if the decision had been placed shortly upon the ground that the monopoly created by the acts so adverted to were within the statute the case would have evidently caused comparatively little discussion.

The decision is, however, of a more broad and general importance, because:

(1) It explains, and it is claimed limits, the general language of the statute so as to remove from its operation

many cases which the literal terms of the law would indicate as falling within it;

(2) It is claimed to be in contradiction with rules theretofore laid down and fully established in prior decisions during the past fifteen years.

This view is emphasized and dignified by its statement with great earnestness in the opinion of the Senior Justice of the Court, Mr. Justice Harlan, who, while concurring in the conclusion reached, dissents from the reasoning of the Court. So impressed is this venerable and universally honored jurist with the reasoning of his brethren of the Court that he feels himself bound "to say that what the Court has said may well cause some alarm for the integrity of our institutions" and continues:

"I said at the outset that the action of the Court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the Court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This Court, let me repeat, solemnly adjudged many years ago that it could not, except by 'judicial legislation,' read words into the Anti-trust Act not put there by Congress, and which, being inserted, give it a meaning which the words of the Act as passed, if properly interpreted, would not justify. The Court has decided that it could not thus change a public policy formulated and declared by Congress, that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. . . .

"Nevertheless, if I do not misapprehend its opinion, the Court has now read into the act of Congress, words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution—namely, by interpretation of a statute changed a public policy declared by the legislative department. . . .

"To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all." (Op. Justice Harlan, as printed in New York *Times* of May 26th, 1911.)

The elaborate opinion of Chief-Justice White is evidently designed to show that the course of decisions heretofore has been uniform and that whatever isolated expressions may be found as to the interpretation to be put upon the statutes the results reached in each case have adequately effected the intent of Congress.

The difficulty confronting the Chief Justice arose from the interpretation to be given the words "in restraint of trade." This language of the statute came before the Su-

preme Court for the first time in the now famous case of the United States *v.* the Freight Association, 166 U. S., 290. That case involved a combination of railroad companies which had entered into an agreement fixing freight rates. The Government attacked this combination on the ground that it was in restraint of trade. Mr. James C. Carter, with his extraordinary erudition and ingenuity, defended the combination on two grounds: first, that the Sherman Act did not apply to railroad companies, as these companies were subject to regulation by act of Congress in a manner that did not apply to ordinary private companies and that as public utilities they were not within the fair intendment of the act, since the right which the State had to fix rates was inconsistent with the idea of a monopoly menacing to the public weal; and, second, that the record showed the rates to have been reasonable and proper and that, under the doctrine of the common law, of which the Sherman Act was merely declaratory, a contract which reasonably restrained trade was not involved. The first question was the one mainly discussed and the Court found that the act was applicable to railroads. Incidentally I may say that our courts take what certainly seems, at least from an economic standpoint, the sounder view and exclude public utilities from the general category of monopolies and restraints on trade. (Matter of Attorney-General *v.* Consolidated Gas Company, 124 App. Div., 401.)

The Court further held that they were unwilling to consider whether the rates in question were in themselves reasonable, since the terms of the statute were absolute and categoric and forbade all restraints of trade, whether reasonable or not.

"By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress." (United States *v.* Freight Association, 166 U. S., p. 328.)

This utterance of the Court was unnecessary to the de-

cision of the case and was what is termed by lawyers an *obiter dictum* or remark or argument not logically necessary for sustaining the conclusion or judgment reached, since the agreement would certainly have been invalid under the common-law rule. I am convinced that it is this dictum in the opinion of Mr. Justice Peckham, writing for the majority of the Court, which has led to the futile and academic discussion as to the rule of "reasonableness." The opinion in the Freight Association case in my view misapprehends the real scope of the common law. The common law, about which so much has been said, is not really difficult of ascertainment; its general propositions regarding this class of cases are clear enough, however difficult of concrete application.

There were three categories of illegal agreements restraining trade known to the common law:

(1) Contracts in restraint of trade;

(2) Combinations or conspiracies in restraint of trade; and

(3) Monopolies.

1. Contracts in restraint of trade had a fixed and definite meaning and go back to the time of the Year Books of the fourteenth century. Such a contract was one by which a person selling his business or trade contracted that he would not further carry on such business. The object of the contract was to protect the vendee against the competition of his vendor, which might easily have made his purchase valueless. In the earliest times any such contract was held invalid, because the man who contracted not to carry on his trade was abridging his freedom and was liable to become a public charge. Gradually, however, these agreements came to be recognized as valid within certain limitations. Where it was evident that the object of the agreement was merely to assure the vendee the possession of the good-will of his business and where the limitation was not such as to indicate that the primary object of the agreement was to monopolize the trade, but was merely a reasonable accompaniment of a contract of sale, it was held valid. The general rule consequently came to be that a partial restraint of trade would be valid while a general restraint was not. For instance, a baker selling his shop might validly contract that he would not carry on his trade in London, but he could not agree that he would not carry it on in England, as this would have been

unnecessary to the protection of the vendee and hence unreasonable and oppressive, indicating the primary purpose of the agreement to be the creation of a monopoly rather than the protection of a business good-will.

With the changes in transportation and industry the question of partial or general restraint of trade lost much of its significance, and the query was whether the contract of restraint was "reasonable" or "unreasonable." This category of reasonableness at the common law is not vague and subjective, but is extremely concrete and clear. It was a question for the court and jury in each case to decide upon the facts as to whether the contract in restraint of trade was merely collateral or ancillary to the contract of sale. If so, such indirect or partial restraint of trade was considered as a reasonable exercise of the right of free contract. When, on the other hand, it appeared that such a contract had for its main object restraint of trade or practical monopoly, then, however the agreement might be phrased, the Court would hold it an unreasonable exercise of the liberty of contract and void as directly restraining trade.

2. I am convinced that the Court in the Freight Association case confused this very distinct class of contracts in restraint of trade with a very different legal category—namely, *combinations in restraint of trade.* By this term the common law indicated an agreement among various persons maintaining separate business establishments to fix or in some way regulate the prices or the output of the various establishments. Such contracts have been always and at all times contrary to the policy of the common law and to them no criterion of reasonableness was applicable. (See Justice Holmes's dissent, 193 U. S., 400.)

Agreements having for their object a direct restraint of trade, by interfering with the rights of each of the parties thereto to sell at what price he pleased or restricting the output, necessarily fell within the inhibition of the law and were invalid. The rule is very clearly stated in an opinion of the Court of Appeals of New York (People *v.* Sheldon, 139 N. Y., 251). This case dealt with a combination between dealers of coal in the city of Lockport to fix the rate at which coal should be sold. The members of the agreement were indicted under the section of the Penal Code making it a misdemeanor to commit "any act injurious to trade or commerce." The same argument was used in defense of the

combination as in the Trans-Missouri case, that the rates were *fair and reasonable.* The Court evidently did not consider that there was any difference between the meaning of the statute and the general rule of common law, and dismissed the argument as to the reasonableness of rates by saying:

"But the question here does not, we think, turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public or to the community in Lockport. The question is, was the agreement, in view of what might have been done under it and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation. . . .

"The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are in contemplation of law injurious to trade, because they are liable to be injuriously used. . . .

"The price of coal now fixed by the exchange may be reasonable in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. . . .

"If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character" (pp. 263-265).

Still more recently the common-law doctrine has been lucidly expounded by the New York Court of Appeals in a suit brought on an agreement between producers of Hudson River blue stone, who controlled nearly ninety per cent. of the amount sold in New York. It was urged that the jury should be allowed to pass upon the reasonableness of the prices, but the Court held the question immaterial in this class of cases and differentiated them from those contracts which involved the withdrawal of a vendor from business and in which the restraint was incidental to a sale rather than constituting the primary purpose of the agreement.

The Court said:

"It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. *The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity.* They could raise prices to what they supposed the market would bear, and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great.

"The plaintiff cites the cases which permit the vendor to sell his business with or without his plant, and to agree with his vendee that he will not by competition or other acts do anything to injure what he sells. . . . It may be conceded that the law, as now understood, restrains no one from selling his property, nor does it compel any one to continue a business which he

can sell, or finds it to his interest to abandon, much less to continue it for any time or in any particular manner or place. However it may have been when trade was small, money scarce, opportunities and markets few, at present the public has little to fear from any individual renouncing his calling and business in favor of another, and seeking a new field of activity. Contracts between individuals to that effect are not in general restraint of trade. But the case before us is of a different kind. It is one of such a combination among many dealers as threatened a monopoly, with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced would be either compelled to submit to its exactions, or to forego the purchase of the commodity of customary use needful to them, and but for this monopoly obtainable in the market at a reasonable price. The same evil principle pervades both large and small combinations; all are alike offenders, differing in degree, but not in kind. And hence it is that contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and are void." (Cummings *v.* Union Blue Stone Co., 164 N. Y., pp. 404, 405.)

The emphasis placed upon the words " reasonable " and " the light of reason " by the Court in the Standard Oil case was perhaps unfortunate. It is quite probable that for the words " reasonable " and " unreasonable " with regard to restraints of trade the words " direct " and " indirect " restraints could be advantageously substituted. This would put the test of validity in a clearer, less subjective and metaphysical light and distinguish between combinations which have for their primary purpose restraint of trade and those contracts which may incidentally restrain trade, but whose main object is the sale of a business.

The identity between the test of *reason* and that of *directness* is recognized by the Chief Justice in the Standard Oil case, for he says, referring to the rule of reason:

"From this it follows, *since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing,* that the difference between the two is therefore only that which obtains between things which do not differ at all" (Op., pp. 25, 26).

3. The third common-law concept comprised in the statute is that of " monopoly." " Monopoly," strictly speaking, at common law could only arise from a Crown grant and is defined by Lord Coke as follows:

"'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are

sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade'" (Op., p. 15).

It is quite evident that no such conception of *monopoly* is here involved and that the great combinations of to-day are not "monopolies" in this narrow sense, but are rather capitalistic aggregates whose size and consequent power permit them to effectually prevent any real competition and thus effect those evils which the common law attributes to monopoly.

The purpose, however, of the common law was to preserve, as far as possible, freedom of contract, and it was felt that this was menaced either by a Crown monopoly, combinations in restraint of trade, or unreasonable contracts in restraint of trade. In addition to all these, there were at common law certain peculiar contracts called "engrossing" or "forestalling" which had for their object the obtaining of supplies of the necessaries of life with a view to completely controlling the market. These laws were repealed in the early part of the century, but have an analogy in the anti-option laws found in some of our States.

Had the Supreme Court, therefore, in the Freight case and the Traffic case considered the language of the act in the light of the common-law meaning of the terms there used, they would have had no difficulty in coming to the conclusion that a combination of a number of persons or corporations for the purpose of fixing prices was contrary to the common law as known in England and America. The statement of the Court in those cases that they were bound to take the language of the law literally and condemn all contracts in restraint of trade, whether reasonable or unreasonable, was founded upon an apparent misconception of the common law and a failure to distinguish between "contracts" and "combinations." It is perfectly evident that the Court was right in holding that, however reasonable the rates fixed by the Freight Association may have been, the very fact that the objective of the agreement was the fixing of rates made it illegal *per se*. So broad was the dictum of the Court that:

"By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade" (p. 328).

it became necessary seriously to qualify it in the next case. In fact, Mr. Justice Peckham's opinion in the Freight case

itself recognizes the distinction between "direct" and "indirect" contracts in restraint of trade, for he says:

"A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, *which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question*" (p. 329).

In the Joint Traffic case practically the same agreement was again brought before the Court and the question reargued by the same counsel; it was insisted that the construction of the Court was such as to interfere with ordinary business and all real freedom of contract, and a number of instances were cited, such as the formation of a corporation to carry on any particular line of business by those previously engaged therein or a contract of partnership between two persons previously in the same line of business, etc., to which the Court replied:

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good-will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business." (U. S. *v.* Joint Traffic Assn., 171 U. S., 567, 568.)

And in commenting upon the case of Hopkins *v.* United States, 171 U. S., p. 578, decided at that same term, in which it was held that the statute applies only to those contracts "whose direct and immediate effect is restraint upon interstate commerce," the Court said:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce.

"*To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this Court.*" (U. S. *v.* Joint Traffic Assn., 171 U. S., p. 568.)

If I have quoted fully from these cases, it is for the pur-

pose of demonstrating that the Court did not interpret the statute literally as forbidding all contracts or combinations which might incidentally restrain trade. The Court there held, and held rightly, that the criterion of the statute was whether the restraint was a direct or an indirect one. As they refused to construe the statute literally the dictum in the Freight Association case that all contracts fall within its scope is scarcely consistent with the remainder of the opinion, which, when read as a whole, is clear enough.

It is, nevertheless, unfortunate that the Court apparently distinguished between the scope of the common-law rule and that of the statute and misconceived, as I think, the application of the word "reasonable." At common law it would have been no defense to any combination having for its object the fixing of prices to maintain that those prices were reasonable, and the Court in deciding this defense to have been unsound did not go beyond the common law. The expressions referred to in Mr. Justice Peckham's opinion explain the not unnatural popular misapprehension as to the meaning of the word "reasonable," and the present criticism that the Court has at this late date, after fifteen years of adjudication, now for the first time read that word into the statute.

Had Senator Sherman's original law stated that "(1) all contracts in unreasonable restraint of trade and (2) all combinations and conspiracies in restraint of trade are illegal and void," it would have declared the common-law rule both accurately and discriminatingly.

It is evident that the simple distinction between "direct" and "indirect" contracts in restraint of trade effects the intention of Congress, which was not to paralyze the industries of the country by (to use Mr. Justice Peckham's language) "a most violent assumption," but was to prevent those agreements whose primary object was restraint.

It has been argued popularly and the point has been raised in various cases that restraint of trade and restraint of competition do not mean the same thing. This point is fanciful rather than real. Restraint of trade, as the history of that term at the common law shows, included any restriction by which any individual or individuals should, by voluntary act or otherwise, be inhibited from carrying on their trade or business in their own way, which is equivalent

to restraint of competition, and the Courts have uniformly so considered it. There is, however, this truth in the suggestion that there may well be indirect restraints of competition which may not in themselves restrain trade. This, however, is only illustrative of the fact that the distinction between the two classes of contracts and combinations is that between those which restrain directly and those whose restraints are merely indirect and ancillary to some other purpose.

This view is emphasized by the next important case, which is that of the United States *v.* Addyston Pipe and Steel Company, which dealt with a combination of manufacturers for the purpose of dividing the territory in which their product was to be sold. In the Circuit Court of Appeals the opinion was rendered by Judge Taft, who held such an agreement to be a combination in direct restraint of trade and to fall within the statute. He reviewed in very exhaustive fashion the prior cases and delved deep into the common law, finally concluding that a combination among a number of persons engaged in a particular business to stifle or prevent competition and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition is contrary to public policy as found either at the common law or in the statute. In this very case it was urged that the prices at which cast-iron pipe was sold were reasonable, to which Judge Taft answers:

"We do not think the issue an important one because, as already stated, we do not think at common law there is any question of reasonableness open to the Courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices had they chosen to do so." (85 Fed. Rep., p. 293.)

When the case came to the Supreme Court the question mainly considered was whether the agreement so directly affected interstate commerce as to fall within the statute. This being decided in the affirmative, the combination was declared illegal.

The views of Judge Taft are also those of President Taft, since in a recent message he says:

"It has been proposed, however, that the word 'reasonable' should be made a part of the statute and then that it should be left to the Court to say what is a reasonable restraint of trade, what is a reasonable suppression of competition, *what is a reasonable monopoly.* I venture to think that this is to put into the hands of the Court a power impossible to exercise on

any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden that they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster."

The message has been quoted as in conflict with the views of the Chief Justice, but I do not think there is any real conflict. Of course there could be no "reasonable" monopoly, since, as the Chief Justice points out, the very objective both of the common law and the statute is monopoly. The test of reason merely applies to the question whether the combination or contract aims at or tends to monopoly. The use of the word "direct" and the elimination of such a vague phrase as "the light of reason" would have greatly clarified the situation.

In Swift *v.* United States a combination of beef-packers was equally held invalid, and it was quite clear that the combination would have been invalid at common law.

The famous Northern Securities case involved a different state of affairs, in that a holding corporation was devised for the purpose of controlling both the Great Northern and the Northern Pacific Railway companies. A grave constitutional problem was involved as well as the question whether the creation of a corporation for holding the stock of both companies was a combination within the Sherman Act. The majority of the Court held that, although the modern form which the transaction had taken differed from the combinations theretofore before the Court, it was still in effect a combination, the object of which was to create a monopoly and hence within both sections of the act.

Mr. Justice Brewer, however, in concurring with the majority of five whose votes were necessary to the affirmance of the decree against the railroads, dissented from much that was said in that case. His opinion is interesting in that it again raised the question of reasonableness. Referring to the Freight Association case, while he thinks the decision correct, he yet says:

"Instead of holding that the Anti-trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions

at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in *direct* restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended." (Northern Securities Co. *v.* U. S., 193 U. S. at p. 361.)

Mr. Justice Brewer, like the present Chief Justice, found some of the language of the Freight Association and Joint Traffic cases so sweeping as to be of a misleading character and felt that the test of reasonableness or directness should have been more explicitly stated. General expressions and opinions are often dangerous, and certainly the expressions used in the Traffic cases have caused a great deal of difficulty and confusion both at the bar and in the world of business. They well illustrate the wisdom of limiting an opinion to the discussion of those matters necessary to a disposition of the case at bar; otherwise they may, to use the happy phrase of Mr. Justice McKenna, "like the exhalations of a marsh, shine to mislead." (De Lima *v.* Bidwell, 182 U. S., p. 205.)

Even after the decision of the Northern Securities cases, the question still remained whether certain large concerns, which, claiming to be the result of natural and normal growth and disclaiming all intention of driving others from the field or of monopolizing any branch of trade, fell within the act. If the act were to be interpreted with the scrupulous literal accuracy evinced by some of Justice Peckham's dicta, it might reasonably have been supposed that every business in the country, which had in any fashion absorbed the trade of its competitors, was obnoxious to the law.

So doubtful did the bar and the bench feel in regard to this statute that the presiding judge of the Circuit Court of Appeals in the case of the United States *v.* American Tobacco Company voiced at least the popular view as to the construction theretofore placed upon the statute by the Supreme Court as follows:

"Disregarding various dicta and following the several propositions which have been approved by successive majorities of the Supreme Court, this language (every contract, combination, etc.) is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers, however small. As thus construed

the statute is revolutionary. By this it is not intended to imply that the construction is incorrect. . . . The act as above construed prohibits every contract or combination in restraint of competition. Size is not made the test: Two individuals who have been driving rival express-wagons between villages in two contiguous States, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not." (164 Fed. Rep., pp. 701, 702.)

Under these circumstances, the result of the Standard Oil case was awaited with tense anxiety, and it was a cause of general gratification that the judgment was unanimous. It appears, however, unfortunate both for the Court and for the nation that Mr. Justice Harlan felt constrained to dissent from the reasoning of his brethren of the Court. As he had concurred with the majority of the Court in the Freight Association case and the Joint Traffic case, it is evident that even he does not read the statute with literal accuracy as applying to all contracts in restraint of trade, for he took no exception to Mr. Justice Peckham's view that contracts which merely incidentally restrained trade were not within the statute.

The Chief Justice certainly endeavored to deduce from the language and history of the statute and from the foregoing cases some rules by which it might be possible, with a reasonable degree of accuracy, to predict what transactions fall within the act. He analyzes with minuteness and care the English law and concludes that the English decisions and statutes were directed against monopolies and those contracts which may be considered to have resulted in some of the injurious consequences ascribed to monopolies. It hence came about that contracts or acts which were considered to have a monopolistic tendency, especially those which were thought to unduly diminish competition and thus to enhance prices (in other words, to monopolize) came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade and therefore as monopolies generally. It is difficult to abridge or paraphrase his *résumé,* therefore I quote it *in toto:*

"In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results,

" (a) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practise had come to be considered as in restraint of trade in a broad sense.

" (b) That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

" (c) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided" (Op., p. 21).

These conclusions certainly seem to give full effect to the intention of Congress, which was to confer upon the Federal Courts power to prevent monopoly and the wrongs incident to attempts to monopolize, adding to the common-law invalidity of such agreements the sanctions of criminal law.

It may be regrettable that the Chief Justice uses the terms " unreasonable," " undue," " the light of reason," and " direct " and " indirect " as meaning one and the same thing, thus seeming to create a somewhat vague standard, but the Chief Justice certainly does not mean the " reason " of each individual court or judge nor any philosophic conception of " light of reason." It is generally held that Public Service Corporations cannot have their charges reduced by the Legislature beyond what is reasonable. This criterion

has not been found impracticable or even very difficult of application. Whether certain State requirements are proper exercise of the police power or interferences with interstate commerce is a matter which depends upon the reasonableness of the regulation, or, in other words, whether the effect upon such commerce is merely incidental or indirect. (Smith *v.* Alabama, 124 U. S., 465.)

From the analysis already made it seems to us that the language of the statute and the results of all the decisions as to the Anti-trust Act bear out the view *that all contracts and combinations which directly tend to restrain trade are unlawful, and that all attempts to monopolize, brought about by whatever methods, whether old or new, are equally within the statute.*

It may, nevertheless, be thought that these criteria are of so general a character as to be of little value in predicting the results in specific cases. This is undoubtedly true, and yet I submit that, under the circumstances, the Court could not have dealt with the statute in any other way. It has been urged that it would be probably illegal and certainly immoral to indict any one for having unreasonably restrained trade, since the criminal law should be sufficiently certain to give persons some definite notice as to what constitutes its infringement. While this argument has seeming force, many statutes are equally and perhaps unavoidably as vague. One is forbidden, under severe penalty, from driving negligently along the highway, and it is for the judge to charge the jury what constitutes negligence. So it must, under this statute, be for the judge to charge the jury as to what constitutes combinations in restraint of trade or an attempt to monopolize. A monopoly in the modern sense is a capitalistic monopoly and may be no more than a great aggregate of wealth concentrated under one control which renders in actual practise all real attempts at competition ineffective.

The decision in the case of the United States *v.* American Tobacco Company just decided but reaffirms and reiterates the doctrine enunciated in the Standard Oil case and applies it to a more complex and difficult situation. The Chief Justice in that opinion explains the necessity of a fair and liberal construction of the statute, one which will carry out the intent of Congress to check monopolies while not interfering with those ordinary and normal contracts which it

was the object of the statute to protect. The view of the Chief Justice may be summed up by saying that a liberal construction of the statute alone will make it really effective, and as so construed it must be declaratory of the common-law rule which had in view the same purpose as the act—namely, the protection of freedom of contract against impairment by monopolies. A narrow, literal construction would thus not only be anti-historic, but wholly nugatory of the intent of Congress, in that it would paralyze that ordinary and natural trade development whose main purpose it was to safeguard. The Chief Justice thus appositely puts it:

"The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us." (Op. American Tobacco case, p. 27.)

The remedies applied by the Court in the Tobacco case seem peculiarly appropriate to the elimination of monopolistic features, while not of so drastic and merely destructive a nature as to disastrously affect the interests of the public and of innocent stockholders.

It is probable that in future the criminal feature of the law will be more largely relied upon by the Government as a deterrent to monopoly. In this event the question of intent will evidently be of very great importance. The general legal doctrine is that there is no crime without intent, but this is only a rule of construction which may be negatived by the Legislature. There is a class of cases in which the courts have held that the plain language of statutes made immaterial the question of intent. In such cases the fact that the persons charged have violated the express prohibition of the law is sufficient ground for conviction. A typical case of this kind is one arising under the statute of New York preventing the sale of impure or adulterated milk. While it was admitted that adulterated milk had been sold, proof was offered that this was without the knowledge, and therefore the intent, of the defendant, to which the Court of Appeals answers:

"As the law stands, knowledge or intention forms no element of the offense. The act, alone, irrespective of its motive, constitutes the crime. . . . Experience has taught the lesson that repressive measures which depend for their efficiency upon proof of the dealer's knowledge and of his intent to deceive and defraud are of little use and rarely accomplish their purpose." People *v.* Kibler, 106 N. Y., pp. 323, 324.)

While it still is open to question as to whether the Sherman Law is in the same category, yet, where a monopoly has been actually created, it will probably be well-nigh impossible for defendants to escape upon the ground of lack of intent. Persons are always presumed to have intended the natural effect of their acts, and the doctrine of intent even where applied, especially in cases of purely statutory delinquencies, has been beaten out very thin.

There may be and probably are sound objections to the statute on economic grounds, but I do not believe that it can be successfully challenged upon the ground of vagueness or uncertainty. It has always been a difficult question to draw the line between "direct" and "indirect" contracts and combinations restraining trade. The difficulty is more acutely and generally pressing to-day because of the approach to actual monopoly in so many of the necessaries of life.

I cannot think that Mr. Justice Harlan is justified in considering the present decision as really at variance with former decisions. Taking these decisions together as a coherent whole, there can be little or no doubt that the result reached in every one was similar to that which would have been reached upon the assumption that the statute was merely declaratory of the common law. It must seem deplorable that so much confusion should have arisen over what now seems to have been a battle of words.

There is necessarily a continuing conflict in society between justice and certainty. That in the law there should be some degree of certainty is necessary to every-day life and the transaction of business, but absolute certainty in the law is only possible in a society whose stability is as great as that of the ancient Medes and Persians; changing social and economic conditions give rise to different situations and to opinions which must ultimately find their way into the law. The warfare against modern monopoly is being carried on with the rusty weapons of medieval England, and any confusing economic result should not be attributed to our

courts. No other result is to be hoped for while legislators, instead of giving these great problems intelligent, constructive consideration, weighing the economic advantage of unified and concentrated production against the social evils which may arise from suppressing great numbers of small producers, content themselves with redeclaring the ancient doctrines, which, if they were ever adequate to cope with the problem, seem completely and wholly ineffective as a solution of the economic problems confronting us at the present time.

The Sherman Law, if construed absolutely and literally, according to the most approved Chinese method, would result in complete economic stagnation. Interpreted rationally in the sense intended by its originator, as declaratory of well-settled rules of common law, it will not annihilate business nor even perhaps very seriously impair its development. It is, however, calculated to leave the whole question of "monopoly" and "combinations in restraint of trade" in an uncertain condition necessarily resulting in suits and prosecutions in which courts and jury must determine in every case whether there was restraint of trade or attempt to monopolize, and all this with results of very doubtful value to the community. The real difficulty lies in the fact that the nation has not as yet thought out any intelligent legislative programme which will adequately deal with new and largely untried economic conditions. FREDERIC R. COUDERT.

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## THE QUANDARY

BY JAMES M. BECK

THE litigation just ended represents an important, though passing, phase in the conflict between the age of the wheelbarrow and that of the aeroplane. The issues involved were something more than "nice sharp quillets of the law." The Sherman Law, originally intended as a mere policing of the channels of interstate trade, to free them from such obstructions as were unlawful at common law, had become an economic theory, and attempted to reconstruct society by defending the primitive individualism of the age of the wheelbarrow from the greater individualism, which in the age of steam and electricity finds its highest expression in association. The ultimate solution of this struggle has probably been advanced by the action of the Court in holding that the whole problem must at least juridically be approached

in the spirit of " sweet reasonableness." Beyond defining the attitude of the Court as one of reasonableness, the decisions, however voluminous, suggest little that is tangible in the solution of the vexed problem of reconciling the liberty to combine with the industrial independence of the individual. We are little wiser than before as to what a restraint of trade is under the Sherman Law, or what restraints will be hereafter regarded as unreasonable. While we are admonished that the " normal " growth of business expansion is permissible and the abnormal inhibited, little light is shed by the judicial lamp of reason upon the social or legal principles which shall hereafter distinguish the " normal " from the " abnormal." Still less do we know when the instinct for expansion becomes " unduly restrictive " of competition.

The demonstration has thus been that of the clinic rather than that of the philosophical laboratory.

This much is clear that two large business organizations are doomed to legal vivisection upon some general but undefined social and ethical principles, and we can only learn the lesson of the clinic by taking note of the conditions of the patients when they went under the surgeon's scalpel.

These two organizations were among the largest and most successful in the world. The same economic tendencies which originally made our nation a governmental unit made these combinations the recognized type of an efficient commercial unit, which produced the maximum of productive wealth with the minimum of waste. Neither became what it was by the governmental favor of bounties or tariffs. Each competed with all comers not only in this country, but in the markets of the world, and each demonstrated in their respective industries the superior force of American energy. Each built up a world-wide trade, which has brought to our country incalculable wealth. Each has been remunerative to their investors, concededly a benefit to the consumers both in the quality and cost of their products, and each, far from restricting trade in any practical way, gave to it an enormous expansion. Neither was in fact a monopoly, for each was confronted with a growing competition. When their histories shall be written it will be said that, however deplorable from an ethical standpoint some of their incidental methods undoubtedly were, especially in the past, the controlling cause of their marvelous growth and world-wide success was inherent in combined capital, scientific management, efficient

organization, untiring energy, and extraordinary business sagacity. If they did not always remember the Golden Rule, neither did their competitors. The policy of the law required them to compete and they competed—but it seems too successfully. They too were subject to an unyielding economic law that the tendency of competition is to restrict the number of the competitors, for as Napoleon once said: "You cannot make an omelet without breaking some eggs." Having outstripped all their competitors in this or any country, they are now under the mandate of a drastic law, which represents the discarded policies of more primitive times, penalized for their success, which is judicially held to be such a menace to individual enterprise as to be injurious to the public welfare. The policy of a law which not only authorizes but compels an individual or corporation to compete, and then penalizes them if they compete too successfully is not unlike the graciousness of the fond mother who gave her daughter permission to go out to swim, but sternly forbade her to go near the water.

How far has this doctrine of reasonableness taught others to beware of the fate of Standard Oil and American Tobacco? What are the limits of permissible growth? What proportion of a given trade may any competitor by his energy and resources secure? How strong must the "dram of eale" ("Hamlet," Act I, Scene IV) of "unreasonable" business methods be to adulterate the "substance" of legitimate power inherent in combined capital, associated energy, and scientific management? When must the successful man or combination pause on the margin of the sea and lament that he can conquer no more worlds because further growth will be visited by the indictment of a Grand Jury or the injunction of a Chancellor? To these questions what answer have we?

Even if the decisions were lighthouses, which would serve to warn other hardy and adventurous mariners of the legal rocks upon which the Standard Oil and Tobacco companies were wrecked, they are not a chart or compass to enable these same mariners to navigate the seas. Indeed, until the *terra incognita* of the "unreasonable" is discovered and charted by some judicial Livingstone or Peary, the administration of the Federal law as to the rights and limits of combination will be in a state of economic anarchy.

I do not criticise the Court. It could only enforce as best

it could a cryptic law. It faced a crisis in the administration of law of extraordinary difficulty. It had given in the Trans-Missouri and Joint Traffic cases a literal interpretation to the Sherman Law, which, if impartially enforced by the Executive Department against all combinations within the spirit of the decisions, would have resulted in business chaos. At least twelve hundred industrial corporations, with capital and resources easily exceeding $10,000,000,000, had been formed by the voluntary combination of individuals, theretofore competitors, and each of these combinations had necessarily resulted in a technical restraint of trade, if that obscure legal phrase is practically synonymous with the diminution of competition. This interpretation of the law, as was happily said by Justice Holmes in his dissenting opinion in the Northern Securities case, "would make eternal the *bellum omnium contra omnes* and disintegrate society, so far as it could, into individual atoms. . . . *It would be an attempt to reconstruct society.*"

Such a law was impossible of enforcement. To avoid committing a great, practical industrial nation to a policy of hari-kari, successive Attorneys-General necessarily ignored its impartial enforcement and as a sop to a supposed public sentiment brought suit only against a few of the larger and more unpopular combinations. A government of caprice was thus substituted for a government of law, and in the vital matter of industrial organization, while a few combinations transacted their business under the shadow of a legal guillotine, many others pursued with impunity the same business methods, adopted the same forms of business organization, achieved relatively to their respective industries the same successful results, and enjoyed relatively like dominating power.

This enforced policy of executive favoritism could not long endure in a government which was happily defined by Justice Brewer to be "one of laws and not of men." Its demoralizing results were patent. It bred a spirit of lawlessness, destroyed faith in the basic principle of our government, the equal protection of the laws, and compelled proud men to stoop to the purchase of immunity by flattery and other forms of sycophancy.

When Mr. Taft became President the situation had become intolerable. Business men pursued their activities under a cloud of doubt and in the shadow of possible prosecution.

In the mean time combinations in obedience to the law of competition, which compelled lesser units to merge in order to meet the larger units upon less unequal terms, came into existence, grew and waxed great, for, as the grave-digger said in "Hamlet":

"Your dull ass will not mend his pace with beating."

The unhappy position of the business man was intensified by the fact that not only had the administration of law ceased to be impartial, but neither bench nor bar had any clear idea what was legal or illegal. Business could probably have adjusted itself to almost any economic theory, however archaic, provided that the rules of the game were clearly defined and impartially enforced. But the business man vainly sought the light as to what the Sherman Law meant by its sweeping and general phrases, but in the end his plight for the last ten years has been that of Belshazzar:

"The king cried aloud to bring in the astrologers, the Chaldeans, and the soothsayers. And the king spake, and said to the wise men of Babylon, 'Whosoever shall read this writing, and shew me the interpretation thereof, shall be clothed with scarlet, and have a chain of gold about his neck, and shall be the third ruler in the kingdom.'

"Then came in all the king's wise men; but they could not read the writing, nor make known to the king the interpretation thereof.

"Then was King Belshazzar greatly troubled, and his countenance was changed in him, and his lords were astonished."

The Supreme Court has interpreted the cryptic characters of the Sherman Law as announcing the "rule of reason." Wall Street acclaims this as a solution in the hope that a temporary sentiment of enthusiasm may push the wheels of industry through the slough of despond. But hard-headed business men either recognize or will soon recognize that presidents, attorneys-general, district attorneys, grand juries, petit juries, and courts will soon differ as to what the "rule of reason" is. That it will little relax the law as to restraint of trade, as applied in the reign of Queen Elizabeth (and long since repudiated by the English bench) can be seen in the recent decision of our Supreme Court in the Parks medical case, which holds that a manufacturer may not sell his own product upon conditions as to the price of resales.

When Mr. Taft became President, he stated that it would be his policy to enforce the law impartially. He, the upright Judge and fair-minded Executive, knew full well what such

a policy would entail. Possibly he solaced himself with Grant's practical reflection that the "only way to secure the repeal of a bad law is to enforce it." He said in his message of January 7th, 1910:

"But such an investigation and possible prosecution of corporations, whose prosperity or destruction affects the comfort not only of stockholders, but of millions of wage-earners, employees, and associated tradesmen, must necessarily tend to disturb the confidence of the business community, to dry up the now flowing sources of capital from its places of hoarding and produce a halt in our present prosperity that will cause suffering and strained circumstances among the innocent many for the faults of the guilty few."

These were and will, I believe, continue to be prophetic words.

To carry out this policy in accordance with the manifesto was a physical impossibility, but if suits had been simultaneously brought against the 1,200 industrial corporations and the many railroad corporations which were within the literal provisions of the statute, there would have been an acute panic and wide-spread disaster. Edmund Burke once said that you could not indict a people. Indeed, future generations will reflect with astonishment upon the spectacle of an enlightened government during the last two decades harrying its own business men for obedience to economic laws. As Disraeli once said: "The government sinks into a police."

Such was the real crisis which confronted the Supreme Court when it considered the Standard Oil and Tobacco cases. It could do little to save a dangerous situation unless it was prepared to disregard its own precedents and conform the interpretation of the statute to the reasonable necessities of the American people and the obvious tendencies of an age pre-eminently of combination.

It chose a course, difficult to justify, as Justice Harlan's powerful dissenting opinion well shows, on strictly technical grounds and with due regard to the principle of *stare decisis,* but amply justified upon the broader consideration of the public welfare. *Salus populi, suprema lex.* It gave a new and more reasonable interpretation to the statute. While it has not solved a vexed question, it has at least made its ultimate solution a possibility. In doing so, the court simply applied a well-recognized and elementary rule of interpretation. Language is at its best an unhappy vehicle of thought,

and whether in a contract, a statute or a constitution, a court always subordinates the mere letter to its obvious purpose and reasonable spirit. The rule was well stated by the same great court as follows:

"The laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such case should prevail over the letter."

Defending this rule of construction from the charge of judicial legislation, the Supreme Court said in the Holy Trinity case:

"This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question and yet a consideration of the whole legislation or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular case."

Popular government would be intolerable unless there was latitude in the interpretation of written laws, for, paraphrasing an epigram of Voltaire with reference to Russia, democracy is a popular despotism tempered by constitutional limitations and judicial interpretation. If, therefore, the present reasonable construction had been given to the statute in the Trans-Missouri and Joint Traffic cases—and the present Chief Justice contended for it as vigorously then as now—it would, I believe, have received general acquiescence and by this time we would have had a series of constructive decisions which would have reconciled upon broad and enduring lines the right of combination with the liberty of the individual; but unfortunately the court sacrificed in the earlier cases the spirit of the statute to its letter, and since then the business interests of the country have been floundering in a very quagmire of uncertainty. Nor will they escape from this fateful morass until the courts give a clear and tangible definition to their "rule of reason."

To many the reversal by a court, which is supreme in fact as in name, of its own deliberately adjudged decisions, weakens its prestige, but this, I think, is a superficial view. The Supreme Court does not pretend to omniscience. Here are nine individuals, exercising the gravest governmental

power in the world and applying rules of action to interests so vast as to stagger the imagination. Overburdened with work and facing responsibilities that are beyond any possible power of accomplishment, the Court is required to decide in weeks and months questions whose rightful solution requires years. Under such circumstances, how can we reasonably expect that absolute consistency which could only co-exist with infallibility? No court in the world has a history of greater honor and more beneficent achievement than the Supreme Court of the United States. If at times Homer has nodded, why in the nod of an overburdened mind should we forget the glorious heritage of the Iliad? In laying down rules which affect the infinitely complicated mechanism of business, it can often only determine the wisdom of its conclusions in the light of practical results. With it, as with any other body of men, hindsight is at times the only practicable wisdom. Far from entertaining a diminished respect for the court, which recognizes the error of its previous adjudication, we should rejoice that the Court is able, like the wise man of the childhood ballad, who, having scratched out both his eyes by jumping into a bramble bush, is able, by jumping back again with all his might and main, to "scratch them in again." The Sherman Law was the bramble bush.

To the student of our institutions the more interesting question suggests itself whether the practical application of the "rule of reasonableness" will not involve an extraordinary assumption by the judiciary of essentially legislative powers. This is emphasized by the decree of the Supreme Court in the Tobacco case, which requires the lower court to recreate by "disintegration" a new condition in "honest harmony" with the law. Having determined that Congress intended to forbid any combination which is injurious to the public welfare, the Supreme Court now assumes, as a judicial duty, the determination of what forms of business activity are thus injurious and what are the limits of permissible growth. This requires it to lay down principles of public policy, which seem to me essentially legislative in their character. Had Congress inserted the word "unreasonable" in the statute and left it to the judiciary to interpret and apply, the judiciary might well have declined to do so on the ground that it was a virtual delegation by Congress of its duty to legislate. This is even more true when it is the Supreme Court, and not Congress, that has inserted in

the statute the qualifying adjective "unreasonable." President Taft clearly showed this in one of his recent messages to Congress. He said:

"It has been proposed, however, that the word 'reasonable' should be made a part of the statute, and then that it should be left to the court to say what is reasonable restraint of trade, what is a reasonable suppression of competition, what is a reasonable monopoly. *I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to best judgment.* It is to thrust upon the courts a burden they have no precedents to enable them to carry, *and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster.*"

These were brave and sagacious words and their full significance will only develop in the light of experience as the courts attempt to apply the vague rule of "reasonableness." While the social compact, in our country represented by the Constitution, permits the natural liberty of men to be restrained by such "just and equal" laws as the common welfare requires, yet it is equally fundamental in a free government that such laws should clearly define what is permitted and what forbidden. Otherwise ours would be a government of men, not of laws. In the case of Chicago *vs.* Day, Justice Brewer held that a penal statute forbidding a railroad to charge an "unreasonable" rate would be void for want of certainty,

"for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."*

The statement above quoted was that of Justice Brewer, sitting in circuit, but in United States *vs.* Reese, decided in 1874, Chief-Justice Waite, speaking for the Supreme Court, said:

"If the Legislature undertakes to define by statute a new offense and provides for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know when he is committing a crime. . . . *It would certainly be dangerous if the*

* He illustrated his meaning by a citation of the Chinese Penal Code, which punished any man with forty blows who was guilty of "improper conduct." It is true that this great jurist only had reference to a criminal statute, but—at least—in its ethical aspects there can be no sound distinction between a Delphic law, which imprisons a man for an offense and which leaves the definition of the offense to each jury, to be determined by caprice or varying judgment, and a similar law, which restrains liberty of action, forfeits property, or otherwise impairs a man's natural liberties.

*Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would to some extent substitute the judicial for the legislative department of the Government.*"

Chief-Justice Marshall said in United States *vs.* Wiltberger, that "it is the Legislature, not the court, which is to define a crime and ordain its punishment." And yet our Wall Street Mark Tapleys are now rejoicing in the very vagueness of the term "unreasonable," probably on the principle of the King in the trial scene of *Alice in Wonderland,* who was glad that some documentary evidence was without definite meaning, for, as he said, "that would save a lot of trouble."

This humane principle as to the necessary definiteness of a law is not novel, for even the civil law, developed in the time of the Cæsars, said, "*Ubi jus incertum, ibi jus nullum.*"

This salutary principle has never been recognized in our trust legislation. The cruel mockery of the Sherman Law has been that each business man, under the peril of possible imprisonment, has been required to interpret infallibly a statute which the Supreme Court itself has failed to interpret consistently for twenty years and as to which it has at length reached no more definite conclusion than that business men must avoid any "unreasonable" restriction of trade.

Chief-Justice White, in my judgment the ablest dialectician of the Supreme Court since Marshall's time, justifies the assumption of legislative power to determine what is reasonable in the matter of economics by referring to the fact that courts have immemorially determined, upon complex and often conflicting facts, whether a litigant has been guilty of fraud, and he suggests that the word "fraud" is as elastic in meaning as "reasonable." I confess that I cannot follow the analogy. Whether a party has been guilty of a fraud depends upon certain sharply defined moral principles upon which, as plain matters of right and wrong, all reasonable people are in accord and which are therefore axiomatic, but in determining what is reasonable, as affecting favorably or adversely the public welfare, the court must enter upon the whole vast domain of economics. Fundamentally the court must consider whether the prevention of the waste incident to unrestricted competition outweighs, as a public advantage, the power which such restriction gives to oppress the consumer with exorbitant prices. This is not a question

about which all men are in accord. On the contrary, it is one of the vital issues between socialism and individualism. The underlying question, therefore, as to how far combination is for or against the common weal goes to the very foundations not only of government, but of society. It involves the vital question whether the machinery of society is not to-day proceding more through voluntary associations of men than through merely political agencies. In the modern industrial state, boards of trade, clearing houses, labor organizations, traffic associations, even Judge Gary's famous dinners, play a larger and more useful part than Washington bureaus or Federal commissions. All these are questions of public policy and upon these, in my judgment, the legislative branch of the government is alone under our Constitution competent to pass. It was never intended that the judiciary should formulate the public policy of the nation. The reason is obvious. The judges are appointed and hold their positions for life and are therefore independent of the popular will. The representatives in Congress are theoretically the true representatives of the people and they and they alone must determine the fundamental questions of public policy, which are involved in the permissible limits of combination.

The Supreme Court in its wisdom has decided otherwise. It has assumed a crushing burden. The Federal Courts in applying the rule of reasonableness must now determine the limits of combination, the lawful and unlawful forms thereof, the economic necessities of a people, the degree to which competition may be restricted, the ethical character of commercial methods, the invalidity of different forms of competition, the degree to which the telegraph, the railroad, and the steamship may be utilized in consolidating different and competing units into a more efficient and non-competing unit, the proportion of a given trade or industry that a given individual may enjoy, how far prices may be regulated to prevent loss and how far production can be restricted to prevent waste. In other words, they must now be the arbiters of conflicting schools of philosophy and economic ideals. Which was right, Jefferson and Adam Smith, or Hamilton and Karl Marx, the individualism of Herbert Spencer or the socialism of John Ruskin? I cannot envy them their self-imposed burden.

I agree that all these questions can be more intelligently passed upon by the judiciary than by the Legislature. It

has been the experience of both England and the United States that regulations of trade could be effected better through judicial interpretation than through legislative action. Written statutes have a certain rigidity, and, when applied to complicated facts, are too inelastic for practical use. The courts, however, in deciding successive questions upon concrete facts can cautiously and conservatively suggest definite principles of public policy and can adapt these principles by judicial interpretation from time to time to the expansion of industry and changing social conditions. Indeed, the law as to restraints of trade has been largely developed by the judiciary, but this has arisen from the practical workings of the English Constitution, under which the judges had unquestioned legislative powers. The common law of England is judge-made law and the essentially legislative character of many of its rules have been disguised in the ingenious fiction that the principles of the common law are based upon immemorial usage and unrecorded acts of the legislative branch of the government. No such fiction exists in our constitutional form of government. Its basic principle has been the separation of the executive, legislative, and judicial branches. The United States has no common law as such and the Federal Courts have no power as the English bench to formulate rules of economic policy in the absence of legislative action. Their power is restricted to the Constitution and statutes of the United States. The Sherman Anti-Trust Law neither delegated nor could it constitutionally delegate to the Federal Courts the power to formulate rules of public policy with reference to combinations.

This assumption of legislative power, however, simply follows the trend of our constitutional evolution, which is rapidly obliterating the line of demarcation between the three co-ordinate but theoretically independent departments of the government. Thus, the Supreme Court in the Granger cases, decided in 1876, held that the power to fix the compensation of a public utility corporation was legislative, but in a later case it assumed the right to determine under the Fourteenth Amendment whether the rate prescribed by the Legislature was reasonable. This in effect gave to the judiciary the ultimate power of fixing, although not initiating, the rate of compensation. For this assumption there was the justification of enforcing the Fourteenth Amend-

ment, but in the present assumption of power to determine the reasonableness or unreasonableness of different forms of combinations and thereby to regulate, by permissions and prohibitions, the whole field of economics, no such constitutional power can be invoked.

The doctrine of Montesquieu as to the distribution of all governmental power among three separate bodies of magistracy, namely, legislative, executive, and judicial, was, as Madison affirms in No. 47 of the *Federalist,* recognized by the Constitutional Convention as the very foundation of its labors. The fathers believed that where there was a union of these powers in one man or one body of men, there could be no public liberty. As Justice Miller said in Kilbourne *vs.* Thompson (103 U. S., 168), this distinction has always been regarded as " one of the chief merits of the American system of written constitutional law," and he added:

" The perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."

Until recent years, when the tidal wave of socialism has swept our institutions somewhat from their ancient moorings, this was the accepted doctrine of the American people. The axiom of Locke in his essay on Civil Government was still accepted as basic that " the Legislature neither must nor can transfer the power of making laws to any one else nor place it anywhere but where the people have." But in this as in many other respects our institutions have inevitably felt the centripetal influences of steam and electricity. Even before the railroad and the telegraph, Napoleon sagaciously said, on the eve of the 18th Brumaire:

" Notwithstanding our pride, our thousand and one pamphlets, our endless speechifyings, we are very ignorant in political and social science. We have not yet defined what we mean by the executive, legislative, and judicial powers. Montesquieu's definitions are false. In fifty years I can see but one thing that we have defined clearly, which is the sovereignty of the people; but we have done no more toward settling what is constitutional than we have in the distribution of powers. The organization of the French nation is, therefore, still incomplete. This legislature, without eyes or ears for what surrounds it, should no longer overwhelm us with a thousand laws passed on the spur of the moment, that negative one absurdity by another, and that leave us, with three hundred folios of laws, a lawless nation."

*Mutatis mutandis,* Napoleon's criticism could be applied to the present workings of our American system of government. Both to the executive and the judicial branches of govern-

ment there has been in recent years the most palpable delegation of purely legislative functions, and this is largely due to the inability of Legislatures to adjust the statutes to the complicated facts of modern society. Congress has often contented itself, as in the Sherman Anti-Trust Law, with stating in vague terms an object or purpose and then leaving to the Executive and to the judiciary the formulation of the real laws.

It is not unnatural that our country, whose system of government is essentially English, should follow the genius of English institutions in practical administration, while proclaiming its adherence to the political philosophy of Montesquieu, but there has never been before and there is not likely ever to be again a more striking and far-reaching assumption of legislative power than that which is involved in the present trust decisions in committing to the Federal Courts substantially the entire question as to the regulation of the rights of men to combine their energies and resources. Such assumption recalls the prophetic warning of Thomas Jefferson:

"It has long been my opinion that the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary, *an irresponsible body working like gravity by day and by night, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief over the field of jurisdiction, until all shall be usurped.*"

Who can say that this striking characterization of the Federal judiciary as a "thief of jurisdiction" can be said to be without some justification?

But some one may say, why comment on the decision at all? Is it not its own gloss? The Court of last resort has spoken. Its voice is final. What it declares to be the law is of necessity the law, to be recognized and accepted by all as the law until the legislative branch of the government constitutionally declares otherwise. To this I reply that a reasonable discussion of a Supreme Court decision not only involves no disrespect, but may have its value, especially where the question litigated has its large and important political and social aspects. It then no longer concerns the immediate litigants alone, but the public at large, and is as open to public discussion as any other political or social issue, although in a less degree. While it is the law, to be accepted as such, yet the liberty of opinion which the Constitution guarantees still leaves open the essentially political question whether it ought to be the law.

Such popular discussion is helpful to the Court itself, whose decisions upon grave questions of public policy must often be tentative and subject to its own revision. Thus when the Court in the Granger cases (Munn *vs.* Illinois) expressly held that the Legislature could regulate the charges of public-utility corporations and that such right was beyond judicial review as to its reasonableness, the business interests of the country were alarmed as by a fire-bell in the night. If the railroads could only enjoy such earning power as the caprice of any Legislature might permit, then railroad securities were of little value and could be destroyed at will by confiscatory legislation. When the Court, as a result of a public discussion of its decisions, saw the irreparable disaster that would befall corporate investments if the reasonableness of legislative rates were beyond judicial review, it reversed its own ruling and thereby saved many of the railroads from bankruptcy. While the Supreme Court does not, as Mr. Dooley once irreverently said, "follow the election returns," yet it is neither oblivious to nor uninfluenced by, an intelligent and dispassionate public sentiment.

Similarly in the matter of the Sherman Anti-trust Law, the insistent public discussion of the doctrine of the Joint Traffic and Trans-Missouri cases and the multiplying evidences of serious consequences, if such doctrine were impartially applied, has at length convinced the court of its previous error and it is safe to predict that in the future development of the "law of reason" the Federal Courts will be largely aided by a respectful and intelligent discussion of the grave economic questions involved in the present attempt to interfere by law with the complicated mechanism of business.

The problem is a very difficult and important one. It will require, in its final solution, the statesmanship of the legislator, the judicial mind of the court, and the practical experience of the business man. The American people are not willing that all the business of the country shall be concentrated in a few hands. Upon the other hand, they are not willing to disintegrate it into individual units. Some middle ground must be found.

I have great faith that the solution, however long delayed, will ultimately lie along lines in harmony with the natural liberty of association and the expanding genius of our age.

A great and aggressive nation will not long permit itself to be confined in a legislative straitjacket inherited from the time of Queen Elizabeth. Her times were "spacious days" for literature and maritime adventure but not for human liberty. This is not the age of the wheelbarrow, or even of the locomotive. It is the age of the aeroplane, when men sweep the very eagles out of their course in midair.

The Sherman Law is an anachronism in the age of steam and electricity. Ajax defying the lightning has never impressed me with his wisdom. I much prefer the homelike but more practical spirit of a Franklin, who not only disarmed the lightning, but turned electricity to practical uses of great moment. The statesmanship of the future will consider a law, which, while forbidding in clear, positive and scientific language, the abuses of combination, will yet recognize that the spirit of association is at once the most potent and noble manifestation of present civilization.

To this end, the Trust decisions just announced will undoubtedly contribute in their clear recognition that the law is impotent to forbid all combinations which incidentally restrict competition, but the problem is, in its last analysis, legislative in character, and what is imperatively needed is a saner public sentiment, which will compel Congress to conform the laws of business to the irresistible and centripetal tendencies of steam and electricity.

JAMES M. BECK.

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## THE REMEDY

BY SAMUEL UNTERMYER

THE decisions mark a most important epoch in our political and economic history. They have breathed new life and vitality into the law. Even so, we are at last brought face to face with the question of whether, at this late day and after all the vast and irreparable injury has been done which the statute was intended to prevent and would have prevented if it had been honestly enforced, this law is still capable of solving the problems it was intended to meet.

The fact that it has taken us over twenty years to begin (if we really have begun) the carrying out of a solemnly enacted National policy is a self-condemnation of our ca-

pacity for government more scathing and deserved than any criticism ever passed upon us by our most malignant enemies. In all that time we have made no impression upon the evil at which the law was aimed except to see it spread and accentuated, until its baneful influence is felt in almost every department of human endeavor and has infected our entire body politic. It has been allowed to become a cancerous growth which can no longer be uprooted and eliminated without shaking the foundations of our credit and prosperity.

The most formidable of the trusts have had their birth and development under the very shadow of the law which was intended to destroy the few that then existed and to prevent and punish the creation of others.

When Congress in its great wisdom and foresight enacted this law and intrusted its administration to the executive and judicial departments of the Government, the problem could have been easily solved by the use of the effective machinery which was provided and which has proven itself to have been admirably adapted to the purpose. The law is a model of simplicity. Within its brief compass are contained four distinct, comprehensive, and independent remedies: (1) to enjoin the creation of the combination, (2) to punish for its formation or continuance, (3) to seize its property in interstate transit wherever found, and (4) to destroy and dissolve it by the judgment of the Court.

The last remedy is the most difficult and unsatisfactory and the least effective, although it is the sole remedy that has until very recently to any extent been invoked, and then only in the most unequal and spasmodic way.

Whilst these cases were under consideration by the Court, in an address delivered on January 12th, 1911, at the Annual Meeting of the National Civic Federation, entitled "Extermination *vs.* Regulation of the Trusts, Which Shall It Be?" the writer summarized the then existing situation as follows:

"Judging from the uniform trend of the decisions of that Court for the past five years, it is not unlikely that the principle announced by the lower Courts in those cases will be not only affirmed, but *emphasized in the most sweeping fashion* by our highest tribunal, and that every form of combination the *direct* purpose and effect of which is to hamper or limit competition will be condemned.

"Unfortunately for the welfare of the people, I am not, however, satisfied that the decisions will afford any substantial relief from the dangers that are threatening us or that they will either furnish or point out a practical

solution. The provisions of the judgments are drastic, but it does not follow that they are enforceable in practical operation. The companies appear to me to have nothing to fear from the result beyond possible changes in the forms of their organizations.

"The properties and business are there, they belong to the shareholders, and there is no way of confiscating them even if there were a disposition to do so, which happily there is not. The thought of disbanding the central organizations and resolving the constituent companies into their original parts presents an impossible problem. . . ."

A further study of the subject in the light of the decisions confirms the views then expressed.

From the very beginning the execution of the law was intrusted to unfriendly hands and so it has continued to this day. That is the key to all our present difficulties and to the many worse ones that are to come.

Throughout five successive administrations the enforcement of the law has been shirked, evaded, and treated with a degree of insincerity that surpasses anything of the kind in our National existence, until by reason of the long immunity and encouragement to its continued violation we are to-day confronted with the danger that because of the vast power of the offenders and the magnitude of the interests involved the task has grown beyond control, and we shall be forced to resort to other methods to supplement those that were then furnished and were at that time adequate for the purpose.

This criticism applies with equal force to the single Democratic administration as to the Republican administrations that preceded and followed it, and especially to the present administration, which is concentrating upon the "Anti-trust Department" of its marvelous Press Bureau and upon the beginning of aimless, never-ending, but utterly ineffective suits purporting to be directed against the dissolution of the offenders, all the energy that should have been directed to the prompt and genuine enforcement of the remedy by injunction and the criminal sections of the law.

During all these years there has not been a single case out of the many that have been inaugurated in which the evidence produced by the Government in the civil suits and which formed the basis of an academically successful outcome would not have been equally conclusive in a criminal prosecution or through the summary process of seizure under Section 6 of the Act.

To those who regard the recent decisions as instilling new

strength into the statute and who are so confiding as to have preserved their faith in the desire of the Government to enforce the law impartially, the semi-official announcement of the Chief Law Officer of the Government, made a few weeks ago following the decisions, that no criminal prosecutions would be considered until after the expiration of the time fixed for compliance with the decrees of the Court, will come as a surprise. To the "doubting Thomases," it may appear like a continuation of the policy of procrastination to the accompaniment of much noise and fuss and feathers and ending in nothing.

It is at least difficult to understand the relation between the dissolution of the corporation and the long delay in the enforcement of the criminal section of the statute.

It is not usual for the Government to stay criminal prosecutions whilst invoking its civil remedies, especially where, as in these cases, it may be inviting the plea of the Statute of Limitations with respect to some of the offenses charged. The Government did not find this course necessary in its recent prosecutions of the Beef Packers or in the case of the American Sugar Refining Company, in both of which it *first* brought the criminal prosecution for violation of the Anti-trust Law and followed it later with the suit for dissolution of the corporation—both of which are now pending.

Here we have two cases in which the Government has judgments of the Court dissolving the corporations whilst in the Packing and Sugar cases it has no judgment. Yet we are told that we must continue to wait. Why these discriminations? The reason assigned is a trifle obscure. Is this way of administering the Law calculated to add to the respect or confidence of the community for governmental methods?

I do not mean to imply that there should be criminal prosecutions in any of these cases at this late day in view of the encouragement and tacit assent to their legality that have been given to the formation and development of the trusts during all these years. Such of the companies as are willing in good faith and to the fullest extent of their ability to assist in executing the judgment of the Court, segregating and dissolving them, ought to be relieved from criminal prosecution under the circumstances. But there should be no such peculiar processes as have characterized the enforcement of the law.

Equally unconvincing is the assertion made by the able and distinguished Attorney-General in this same announcement, by way of apology for past inaction, to the effect that juries have been reluctant to convict and courts have been unwilling to impose prison sentences in these cases.

Have not cause and effect been rather confused in the making of these statements? If juries have been unwilling to convict or courts to impose prison sentences in the isolated instances of insignificant offenders in which prosecutions have been undertaken, was it not because of the apparent unfairness of the selection of cases for prosecution? Is it not true that the small and helpless and comparatively harmless combinations in the temporary form of pools and trade agreements were the ones thus pursued, whilst the powerful, dominating combinations that were in the permanent and most dangerous forms of consolidations were left undisturbed?

In so far as the criminal sections of the statute have been invoked it has savored of persecution. Courts and juries have rightly refused to lend themselves to the perpetration of such manifest injustice.

How could any court or jury, with the common instinct of human justice, have been expected or asked by a public officer to send these small fellows to prison when every judge and juror knew from his daily experience of the immunity from prosecution that was being extended or permitted to the big fellows?

Note, for instance, the easy frankness, cheerfulness, and unconcern with which the chief officer of the Steel Corporation has been testifying before the Senate Committee concerning the way in which prices are regulated in that industry. The only difference between the facts of that case and the pooling and trade agreements whose members have been prosecuted is that the Steel Corporation dominates the industry, it almost controls the railroad situation indirectly, and it has many ways with which most of us are familiar of compelling obedience to the " gentlemen's agreements " made with it, whilst in the other case there is no remedy against the member who breaks or repudiates the agreement, for it is recognized to be illegal and cannot be enforced by any of the parties. Yet Mr. Gary has told us nothing that we have not known for many years and that is not applicable to other businesses, for these things have been done by the

company in the open light of day with no attempt at concealment. Everybody understood that the Steel Company and the independents have for years been fixing prices.

The reason assigned by the learned Attorney-General for the continued non-enforcement of the law is more than amazing—but for one's respect for his high office it might be justly characterized as frivolous. Why not admit at once what every one familiar with the subject feels—that the Government has by its action (or non-action) in years past misled the business, financial, and investing world into the belief that they were acting within their legal rights in embarking upon these enterprises and that it is more largely than the offenders responsible for the present situation? The condition is rendered the more inexcusable by reason of the fact that whenever in the past ten or fifteen years the law has come before the Supreme Court it has been sustained and strengthened. There has at no time been any justification in the attitude of the courts for the contemptuous treatment accorded the law at the hands of the Government.

It will be time enough for our officials to complain that the enforcement of the statute is unpopular or that it is not supported by public sentiment when they have made the effort to enforce it impartially. The fact is that they are rapidly, however reluctantly, awakening to the knowledge that it is the most popular law upon our statute-books and that the people are insisting upon its vigorous and *impartial* enforcement.

With every desire to avoid injustice to the authorities having in charge the execution of the law, it is impossible to resist the conclusion that they have not been in sympathy with and were not really anxious to support the economic policy announced by the law. How can we otherwise account for the failure during all the years in which these gigantic combinations were forming to resort to the simple and comprehensive remedy of enjoining their creation by injunction as pointed out by Section 4 of the Act, or of seizing their property in transit under Section 6?

Here again the case of the Steel Corporation by way of illustration is a fair test of the justice of this criticism. Its formation was heralded for months in advance throughout the news columns of the press of the country. Formal and official notices that it was about to be launched were

published broadcast as advertisements by Messrs. J. P. Morgan & Co., who were the official bankers and promoters of the enterprise, in the newspapers, addressed to the shareholders of the constituent companies, containing the fullest details of the basis on which the stockholders were to be allowed to participate in the exchange of their securities for those of the colossal new company, with its one and a half billions of new stock-and-bond issues in addition to the hundreds of millions of underlying bonds and of floating debt of the constituent companies.

The Steel Corporation and its shareholders have a just grievance at this belated attack upon it, for its bold and astounding plan of inflation and illegality were fully and frankly exposed in all their amazing details. The organization of the company could readily have been prevented by injunction under the broad powers conferred by Section 4 of the Act in the same way in which that section was recently invoked to prevent the increase of freight rates by the railroads. But there was no crystalized public sentiment at that time against the movement. It is true that few of us quite appreciated the extent of the dangers as they have since been realized, although they had been plainly foreseen and were understood by those who had studied the problem, as is apparent from the fact that the Sherman Law had then been for eight years in existence. It is manifest that it was enacted primarily as a criminal statute to *prevent* further combinations and incidentally to rid us of the existing ones.

The creation of the Steel Corporation and of the hundreds of other combinations that were organized during that period could have been prevented by the use of this remedy by injunction or by the least sign of activity on the part of the officials charged with the execution of the law. Notice that the criminal section of the act would be applied would have been sufficient. Both of these sections—which together with Section 6 constitute the bone and sinew of the law—were left unapplied through all these years, whilst the Government contented itself with the most perfunctory, inadequate, and manifestly insincere and circuitous procedure looking to the undoing of combinations that might easily have been prevented from coming into existence.

The encouragement which the lax administration or non-administration of the law has given to the formation of

these trusts and the extent to which the Government is responsible for the distribution of their securities over the entire civilized world should rightly be considered by our courts and legislative bodies in determining how to deal with the companies. At this late day we are not foot-loose to inaugurate a policy such as might have been enforced to prevent them from being brought into existence, even though we recognize the injury they have done and are doing, and the evil and danger they constitute to our institutions.

In dealing with this vast and complex subject we should first determine whether the Sherman Law as now construed is sufficient to meet the present situation, and if not whether it should be superseded or supplemented. It may safely be assumed that neither public sentiment nor good reason would support the repeal of the law or the relaxation of any of its provisions. The only sentiment in favor of amending the law comes from those engaged in violating it.

It was inevitable that the courts would be forced to take some such construction as has now been announced. To have held that every combination that had the effect of restricting competition, however remote and indirect, was within its condemnation would have reduced the law to an economic absurdity, and have made it applicable to such a variety of proper and necessary business arrangements as to have rendered its enforcement destructive to legitimate business, and to have placed a most dangerous power of discrimination in the hands of the Government.

Every agreement or combination between business men for their protection, the purpose of which is possibly to save the parties to it from business destruction, would have been brought within the prohibition of the act. Such a construction would have led to the most grotesque results, some of which have already been realized as above stated in the few criminal prosecutions against temporary pools and trade agreements that have been "successfully" concluded.

There is no force in the contention that is being made in some quarters that the Law as now construed is too indefinite to be applied as a criminal statute. The argument advanced is, that what is or is not a reasonable restraint of trade now depends upon such a variety of conditions and is so uncertain in its definition that no criminal offense can be predicated of its violation. It is said in this connection

that intent to commit a crime which forms so essentially a part of a criminal offense will be predicated of an act when the party charged with its commission cannot know whether he had a criminal intent until so informed by a jury as a result of his trial for the crime.

The manifest answer is that we are all conclusively presumed to know the law and that convictions would only be asked in cases in which the jury could readily be satisfied that the main purpose of the combination, and that which it accomplished, was a substantial control of the particular industry so as to be able to regulate both prices and output.

Those pools, agreements, consolidations, and other forms of combination that were entered into for self-preservation or to prevent ruinous competition or to protect the small dealers against extermination by their powerful competitors, and those which in their operations demonstrated that they were not levying tribute upon the public would be in no peril. The question in each case may safely be left to the good sense and business judgment of a jury to determine, under instructions of the Court, whether upon the particular facts of that case the parties had a criminal or a lawful intent.

The one would be defined as having for its purpose the control of the industry so as to be able to regulate prices. That would necessarily be evidenced in many ways, among others by the manner of dealing with outside competition; whether competing plants were purchased and dismantled or prices arranged in certain sections of the country so as to destroy competitors and in a variety of other ways that are well known to those who have had to deal with this subject. The earmarks that distinguish the one from the other class of arrangements are not to be mistaken. There need be no fear of difficulty, with the facts before the Court, in enforcing the law so as to avoid injustice.

The criminal section has been rendered more and not less easy of enforcement by the sane construction placed upon the statute.

To those who believe in the economic policy of keeping free from restraint the arteries and channels of interstate commerce, a close study of the opinions will tend to dispel much of the misapprehension that followed the announcement of the first decision. That the Court has retraced its steps and has unsaid and undone much of what was decided in the Trans-Missouri and Joint Traffic Association cases is,

however, hardly open to discussion. No one can read the opinions in those cases and the arraignment of Mr. Justice Harlan without conceding that the logic of the argument, based on precedent, is on his side.

With all due respect to that august tribunal which the members of the Bar so justly revere, the progressive, constructive policy of which we so profoundly admire, one is at times disposed to regret that the traditions of the Court do not seem to permit that it admit its fallibility and frankly announce that it has decided to reject, overrule, or change the law laid down in its earlier decisions, when that is in fact its real purpose, instead of resorting to circumlocution and to distinctions that do not always distinguish.

Would it not be better to recognize that the law is a progressive science, possessing all the elasticity necessary to meet changed economic conditions, and that the rules of law must be formulated and applied in the light of those conditions? We may, if we please, criticise and denounce that exercise of power as judicial legislation and as being in theory lawless and dangerous and contrary to the spirit of our institutions, as Mr. Justice Harlan and other eminent jurists of that great Court have from time to time arraigned it. The fact, however, remains that the bold and at times ruthless exercise of that power has averted many a grave crisis in the history of our country which could not otherwise have been met under the limitations and imperfections of our Constitution, and has made possible the fabulous growth, expansion, and prosperity of our country.

The danger from the arrogation of such power as supplementing and developing rather than construing our Constitution is more fancied than real, more theoretical than practical, as experience has shown, for never in the history of the Court has the power been used except where the urgency was great and never in a way that has not distinctly made for progress and justice.

If the strict constructionists are to prevail, most of the insidious and dangerous crimes of modern finance would have to go unpunished and the criminal provisions of the Anti-trust Law will continue to be a dead letter.

I refer, of course, to the impediments to prosecution formerly existing by reason of the Fourth Amendment to the Constitution, prohibiting the right of search and seizure of papers, and by reason of the Fifth Amendment that no

person shall be bound to incriminate himself—which have now been removed. Under the earlier decisions and until it became manifest that the class of crimes which the law is now earnestly but not yet successfully trying to reach, could not be punished if the individual or corporation was allowed to withhold the books and papers that contained the evidences of the crime, there was no way in which the proof could be made. But when the urgency became pressing the Court met it by practically reversing the rule that had been laid down by it in United States *v.* Boyd, 116 U. S. (1) In the Al Adams case, where it affirmed the principle that even though the books and private papers of a person charged with crime were unlawfully seized in violation of his constitutional rights, the Court would close its eyes to the means employed and would allow them to be used against him. That was a departure from precedent, although the Court cited authority to sustain its position; but the changed conditions required it and they were met. (2) Later in the Sugar Trust and Tobacco Trust cases (Hale *v.* Henkel, 201 U. S.) and again within the past few weeks in the Wireless Telegraph Company case (Wilson *v.* United States) the Court denied the applicability of the constitutional amendments to individuals, officers of the corporations which were charged with crimes with respect to corporate books that were in their custody even where they contained entries of personal transactions. (3) In the case of Twining *v.* New Jersey, where it was decided that the Fourth and Fifth Amendments to the Constitution did not apply to prosecutions in the State courts under State statutes, and that a defendant charged with crime might be there compelled to testify against himself at his trial. (4) Still later and within the past few months we find the law officers of the Federal Government, with the apparent sanction of the law as now construed, inaugurating the practice of arresting individuals under indictment and simultaneously with the arrest breaking into their places of business and seizing and holding their private books and papers, as in the cases of Duveen Brothers, Sheftel, and various brokerage houses.

The last remnant of these constitutional safeguards is disappearing before our very eyes. With the limitations that are found to be in the way of the administration of justice thus removed, why hesitate at merely "moulding" or "construing" the acts of Congress so that they shall

read as they *ought* to have read rather than as they *do* read, especially when the Court is satisfied that it is impracticable to procure their amendment so as to make them workable according to the "rule of reason."

I do not want to be understood as criticising the decisions referred to that appear to change the Fourth and Fifth Amendments "in the light of reason" and expediency. On the contrary, I approve the result, but fail to appreciate the reasoning and attempts at justification that accompany the decisions. They have blazed the way for the enforcement of the criminal section of the Anti-trust Law and for the punishment of crimes more dangerous to our institutions than all the ordinary offenses combined and that must of necessity otherwise go unpunished.

When we consider the history of the enactment of the laws on this subject and the circumstances under which these provisions were inserted in our Constitution, and that the defendant was at that time barred from being a witness in his own defense, there is just ground in the interest of the punishment of the most insidious forms of crime and those most difficult of proof for welcoming the abolition of this fetish of protecting a man against incriminating himself. The innocent man no longer requires it. The guilty should not be permitted to have it.

If it were possible—which it is not *as yet* under our system of jurisprudence—I would advocate the right of the prosecution to place the defendant on the witness-stand, as in continental countries, but only in open court and in the presence of his counsel and subject to many other modifications of their system in order to protect this right against the abuses that exist there.

But we have somewhat strayed from our text in the desire to add our tribute to the Court for its broad and statesmanlike construction of the Sherman Law as against the narrow and literal reading that was pressed upon its attention and which it had adopted in its early decisions before the value and necessity of that law were fully realized.

The Court was confronted with a difficult alternative. If it adhered to the *words* as distinguished from the spirit or meaning of the act, it would have to hold that every agreement or combination that tended to restrain trade was unlawful. Such a construction would render the law unjust, unpopular, unworkable, and ridiculous.

To have attempted to enforce the law under the previously announced construction would have been tantamount to indicting a large proportion of the law-abiding business community of the country. It would have played into the hands of the interests against which it was aimed by rendering the criminal sections impossible of enforcement.

Now that the Court has, however, applied to the law the sensible meaning that it is only intended to cover a *direct* restraint of trade, its scope and justice are made apparent and it will reach the evils at which it is aimed.

It had, however, been hoped and expected that in applying this doctrine of the " rule of reason " in the construction of the statute the Court would have avoided the use of the ambiguous words " reasonable " and " unreasonable " as applied to restraints of trade and that it would have adopted the distinction that has been so ably discussed in a recent editorial in the New York *Times* between the restriction of competition and the restraint of trade. The Court might well have justified its conclusions by pointing out that the law was aimed only against the restraint of interstate trade; that it was intended to reach every form and manner of such restraint; that there is no such thing as a *reasonable* restraint of trade; that *every direct restraint put upon interstate trade is in and of itself unreasonable.*

On the other hand, every restriction of competition does not directly restrain trade. There are many wholesome restrictions of competition that have no appreciable effect on the course of trade in the sense of *directly* affecting or restraining it.

The construction now placed upon the law will render it effective, for it will be applied only against combinations whether in the form of consolidations, pools, or agreements (" gentlemen's " or otherwise) that clearly operate in *direct* restraint of interstate trade.

Those are the evils against which the Law was directed. Against those it will be applied without bringing upon the administration of justice the reproach that it is being enforced against a few whilst applicable to the great mass of business enterprise. It is to be hoped that we have seen the end of the spectacle of the Department of Justice engaging in the prosecution and punishment, as criminals, of little fellows banded together through temporary trade arrangements for self-preservation against their formidable

competitors whilst leaving undisturbed the powerful offenders against whom the law was directed.

The excuse heretofore given that every agreement, however innocent and necessary, that tended to restrain competition was in violation of law will no longer answer.

This I take to be the scope and meaning of the decisions.

Nothing more salutary, nothing better adapted to promote respect for the law, has been accomplished by this great tribunal. No greater peril was ever averted than that of rescuing the law from the contempt into which it was in danger of falling by reason of the spasmodic and unfair method in which the authorities were floundering about in their aimless efforts to make the people believe that they were enforcing the law.

*Will the decisions accomplish any substantial, practical results in restoring competition between the various constituent companies that were combined and which are now sought to be separated?*

With great regret, but with equal confidence, we assert that they will not.

The judgments are very comprehensive in *form*. If they were literally enforced, so far from restoring competition, their tendency would be to further cripple it by prohibiting the parent company from engaging in interstate commerce, because it will be impossible for it to comply with the decree.

As a concrete example, which would equally apply to the Steel Corporation and many of the others, let us examine for a moment the practical operation of the judgment in the Tobacco case. Following the able and illuminating recital of facts in the opinion of the learned Chief Justice, we find that beginning with the combination of the cigarette factories, continuing through the absorption of the smoking-tobacco, plug-tobacco, licorice, tinfoil, snuff, cigar, and kindred branches of the industry, ending in the amalgamation of these various branches under one vast corporate ownership through its various holding and constituent companies, at every stage factories were closed, machinery shifted, and such a transformation of property and assets effected that the reinstatement or rehabilitation of the constitutent industries as separate and independent entities is generally conceded to be impossible.

In the same way brands, trade-marks, patents, and secret processes that represented the main assets of various of the

businesses acquired have been discontinued or abandoned or have disappeared with the factories that were absorbed or have been transferred and mingled with the general fund.

But suppose the Court concludes to deal only with existing properties and assets, if that is possible. How and to whom are they to be distributed? Are the plants to be separately sold at public auction? If so, in connection with what brands or trade-marks? Is that to be arbitrarily apportioned, or are the brands to be sold independently of the factories with which they are now connected?

The control of the share capital of, let us say, the United Cigar Company, which owns the innumerable retail stores, is owned by the parent company. How are these stocks to be taken out of its control? Is the Court going to assume the task of finding a purchaser for the shares representing the ownership of these stores who will not operate them in conjunction with the factories controlled by the parent company? Hardly a likely contingency.

Are the present stockholders of the parent company to have the right to combine, through committees or otherwise, to bid on these various properties? I understand that the judgment forbids that course.

The procedure adopted in the Northern Securities case, which has been cited as a precedent for the course to be followed, here presents no analogy and offers no guide or suggestion. The holding company had there to deal only with the distribution of the shares of two constituent railway companies and a given amount of cash. It distributed the assets pro rata among its shareholders. The proceeding was exceedingly simple, and yet even in that case questions arose as between a distribution in specie and a pro rata division in which the aid of the Court had to be invoked.

Properties that were originally represented by sixty-seven companies are involved here in one way or another. It would be quite impossible within the limits of this article to convey a conception of the situation in all its manifold complications.

Suppose, however, that it were far more simple and that the parent company held in its treasury the shares of only five companies, each representing directly (which it does not) the ownership or control of the properties of a given industry—the cigarette business, the smoking-tobacco business, the plug-tobacco business, the cigar business, the foreign business, etc. It has been suggested that a distribution

by the parent company of the shares of each of these companies among the stockholders of the parent company in the proportion of their holdings in the latter would answer the purposes of the judgment by analogy to the procedure in the Northern Securities case.

But that would accomplish nothing even if it could be done (which it could not), for here the chief industries were merged by ownership into one company (the present American Tobacco Company), so that they can no longer be divided into separate ownerships by stock distribution; but if this could be done the result would be to nominally separate five monopolies that are now held under one charter, so that they will be thereafter held by the same owners and in the same proportions under five different charters. That would only give each partner five pieces of paper instead of one to represent his participation. The Cigarette Company will still have the monopoly of the cigarette business to the same extent as before. Although it would no longer be owned by the same company as owned the snuff or tinfoil industry, its domination of the cigarette industry and over the consumer would be quite as great and as objectionable as before. The same is true of the others.

But the problem is still more complicated. We have not yet begun to encounter the real difficulties. There are approximately $100,000,000 of bonds outstanding, divided into two separate issues. They constitute a debt of the parent company. They are held by the investing public and are scattered all over the world. If the bondholders can be compelled to take their money before it is due, how can the company provide the funds? If the present controlling owners are to be forbidden to buy the properties representing a given industry as an entirety and are unwilling to buy certain dismembered parts, how is the money to be secured to pay the bonds; and until they are paid how can the company move in the direction of dismemberment?

Assuming that this difficulty is overcome by the co-operation of the defendants (and that is the only way in which it can be overcome), how are the cigarette, plug-tobacco, and smoking-tobacco properties and industries to be segregated? They are not separate companies. The properties are owned directly by the parent company through a consolidation effected in 1904 between the Continental, Consolidated, and the old American Tobacco Companies. There are no stocks

of constituent companies to be distributed so far as those companies are concerned, and they constitute the bulk of the assets. They own factories, merchandise, brands, trademarks, etc., amounting to hundreds of millions of dollars, scattered all over the world.

Suppose the Court subdivides the properties into the three separate industries as they existed before the companies were consolidated, and directs that each be again organized under a separate charter and the new share capital deposited with the parent company and then distributed among its shareholders. What has then been accomplished? We have three monopolies, each owned by the same people and in the same proportions, operating separately, if you please, but in the same general interests and ownership as before. Are the stockholders in these now segregated companies to be permitted to exercise their right as stockholders to select their directors, or are they to be perpetually prevented from enjoying the prerogatives attaching to ownership? Shall we not have, in fact, the same real Boards of Directors in each of the ten companies or the same dominating factors behind " dummy " Boards so long as the companies continue to be owned by the same people?

This bare outline does not begin to summarize or to give a faint conception of the complexities inherent in the situation which the Court has undertaken to solve. We have not sought to deal (1) with the interest of the parent company in the foreign companies; (2) with the many constituent companies the shares of which are wholly or partially held by the parent company; (3) with the properties acquired directly by the present parent company since its organization in 1904; (4) with any attempt to segregate any one of the seven or more distinct industries that were consolidated with the present company either through direct ownership or stock control.

Suffice it to say that when we look into the problem of separating the constituent companies with a view of loosening the grip of the combination on any one of the industries the difficulties increase at every step.

With the genuine and hearty consent and co-operation of the defendants and of the general body of security-holders who would presumably follow them, but not otherwise, the thing becomes possible on the surface and to a very limited extent. But even then the measure of the possible relief

would be negligible. It is idle to expect much of a judgment that must depend for its efficiency upon the aid of the defendants against whom it is directed.

What, then, is likely to happen? What must happen?

When the six or eight months allowed for solving this hopeless problem have passed, is the Court going to enforce the injunction contained in the decree against the company engaging in interstate trade without pointing out a way in which it can obey the judgment? If so, the decree will in itself effect a restraint of interstate trade far greater than that accomplished by the company, besides working a confiscation of vast property interests belonging to innocent investors who had every reason to believe from the attitude of the Government that they were embarking their money in a lawful enterprise.

The final outcome is as likely as not to be that the architects of this unlawful structure will be afforded the opportunity to reap as rich a harvest out of its attempted "disintegration" as they secured from its organization, if they are so disposed, of which I do not, however, for a moment believe them capable of taking advantage.

The thing attempted to be done by this judgment simply cannot be done. The Court will of necessity be forced to temporize with the situation. Something will doubtless be accomplished with the co-operation of the company toward avoiding the *appearance* of continued monopoly. A few of the plants in each branch of the industry, or perhaps one or two branches of the entire industry, may be put through the form of sale to outside interests or of distribution through the shares, but it will be at best a mere pretext. Courts are not constituted to deal adequately with questions of this character, and should not be asked to do so.

Instead of open ownership of the constitutent branches of the industry, we shall have "community of interest" with "gentlemen's agreements" wherever continued open ownership will not be tolerated; but we shall never again have actual competition between any of the properties that were constitutent parts of the parent company, no matter how much those concerned may now desire in all sincerity to comply with the judgment of the Court.

Assuming this to be true, even to a qualified extent, the question is presented:

*Is there a remedy, and what is it?*

Our success in dealing with this great problem depends upon our recognizing that there is no complete remedy that will absolutely and completely rid us of the existing trusts and combinations. But there is much that may be done to correct, mitigate, and minimize the existing evil and prevent it from spreading into the industries that are not already controlled.

This, of course, involves first and foremost, but merely as a step preliminary to regulation and not as affording in and of itself a remedy, the enforced organization under the Federal law of every corporation engaged in interstate trade.

There is no reason for resorting to the temporizing measure of Federal license from doubt of the power of Congress to compel Federal incorporation. There must be complete and undivided Federal control, free from charter-tinkering and other interference by the States in order to render any scheme effective. We are unable to appreciate any force in the contention that Congress has not full power in the premises where the corporation is engaged in interstate trade. It is now axiomatic that the power to regulate commerce includes the power to control all the agencies and instrumentalities of commerce. Congress can at any time take unto itself the sole right to charter those engaged in interstate commerce.

It is time the power was taken from the States wherever possible in any event. In the fierce and undignified competition between them for the privilege of granting unrestricted license to prey upon their sister States to corporations which conduct no business within their borders and with which they have no concern, they have so relaxed the safeguards surrounding the issue of corporate securities and have granted such extraordinary and unjustified powers that it has long since become and is a national scandal. The stability of investments and the good name of the nation require the restriction and regulation of corporate powers and uniformity in the form of charters.

The prohibition of the holding company and the protection of the rights of minority stockholders through compulsory cumulative voting and other safeguards are among the urgent reforms that may be incidentally accomplished through a National Incorporation Law. Corporations should never have been allowed to own the stocks of other corpora-

tions. It is only in recent years that any such improper privilege has been accorded them. It is an outcome of the charter trafficking referred to and has been the prolific source of innumerable swindles that are being constantly perpetrated upon minority stockholders.

It is to this abuse that we owe the existence of our most powerful trusts. Through it the pressure has been brought to bear on the helpless minority stockholder to part with his securities at the price fixed by the holder of the majority.

The character of the laws enacted in recent years in the various States creating short Statutes of Limitations in favor of corporate wrongdoers against their stockholders, and otherwise legislating stockholders out of remedies that would otherwise now be open to them for wrongs inflicted by promoters, and controlling interests in corporations makes it necessary that there be restriction and uniformity and greater caution in legislation affecting corporations.

The next step in the process of regulating this subject would be the creation of a Court or Commission similar in its powers over industrial corporations engaged in interstate trade to those of the Interstate Commerce Commission over railroads, giving to that tribunal the power to restrict prices, to permit and approve temporary trade agreements that would be enforcible in the courts similar to those that exist in Germany, Austria, and France.

The writer begs to repeat in this connection the recommendations suggested by him on this subject in the address above referred to on January 12th, 1911, as follows:

"*Rigid regulation under Federal Law is the only just solution.*

"It is possible and practicable and would do away with the grave existing evils which are constantly becoming more serious. As substantially all the combinations that affect the public welfare are engaged in Interstate or International Commerce within the enlarged definition of those terms under recent adjudications, there could be no serious question of the Constitutional right of the Federal Government to regulate and control their activities by a Federal license, if not by a Federal incorporation. Such regulation would, however, in order to be effective have to take a very much wider scope than has yet been suggested. . . .

"Such regulation must include as its most essential feature the power to prohibit by summary process all business oppression and other unfair methods and *particularly the exaction of excessive profits. This involves the power to limit the prices* that may be charged for any commodity beyond a fair profit. . . .

"The practical difficulties of regulating prices to the extent indicated are more imaginary than real.

"*The proposition has never had a hearing.* Wherever any notice whatever has been taken of it the subject has been almost impatiently dismissed, although other countries whose judgment on economic questions is entitled to our respect have adopted the plan and find it practicable.

"The problem, though beset with difficulties, is one that we must solve. I therefore appeal for an approach to its discussion with an open mind.

"When we come to analyze the subject we find that the task is not nearly so complicated as that of framing a tariff, which must presumably take into account not only the cost of production in this country, but also such cost as compared with costs in one or more foreign countries. It is surely not nearly so complicated as will be the duty of the proposed Tariff Commission, which is expected to undertake a scientific study of and report upon the domestic and foreign costs of every known commodity."

It is not suggested that this system shall supersede the enforcement of remedies or penalties under the Anti-trust Law. They should, on the contrary, be merely complementary and supplementary to that Law. When a judgment is rendered against an existing offender it is proposed that it should be the province of the commission thus constituted to determine the manner in which the judgment shall be executed. If, after doing away with the violations, so far as this can be accomplished to the satisfaction of the commission, the offending corporation continues to be engaged in interstate commerce its future operations would be subject to the direction of this commission.

The effective cry that has been raised by the powerful advocates of so-called "business co-operation" and "community of interest," and the one argument that has been pressed upon the students of the economic problem, has been that the only alternative is ruinous competition, and that this is not to the interest of any country.

Of the two evils, ruinous competition is the less disastrous. If the alternative is between the two and the trusts are to be uncontrolled, the people will not hesitate to accept the former.

*But is it true that this is the alternative?* We venture to suggest that it is not. The Sherman Law may be enforced to prevent future combinations in direct restraint of trade, the courts may do what they can toward dissolving and curbing the existing violations, and we may still, through national regulation of the agencies of interstate trade, develop a system that will ameliorate the harshness of competition, permit of co-operation, and secure reasonable profits with full justice to the public if this subject can

be taken out of the realm of partisan politics and dealt with on broad, economic, statesman-like lines.

This may be partly accomplished through pooling or trade agreements between the members of a given industry, regulating prices and production between them—subject to the approval of the national commission or tribunal to be created, somewhat after the general scheme of the German Potash Law of May, 1910.

It would not be necessary to amend or take away from the Sherman Law in order to reach this result by independent legislation. The law creating the commission would provide that no agreement or combination in direct restraint of interstate trade should be sanctioned, and that all agreements thus permitted would be held to be in reasonable restriction of competition and as not in direct restraint of trade.

The commission would necessarily determine the extent to which production might be curtailed and the maximum prices permitted to be charged, which would be subject to change from time to time in its discretion. Any corporation desiring to acquire the business of a competitor would be required to secure the permission of the commission, which would be granted where it appeared that there were legitimate business reasons to support the application and that no direct restraint of trade was involved.

In like manner every contract accompanying a sale by an individual or corporation engaged in interstate commerce of the good-will of his business which restricted him from engaging in competing business should receive the approval of the commission in order to be enforcible.

There would be many great and manifest advantages to the public in sanctioning these kartels, or trade arrangements; among others (1) the permission thus given would involve each owner retaining his own property; (2) it would destroy one of the incentives and the only plausible pretext for trusts and consolidations in the form of a single ownership; (3) inflated stock issues, oppression of competitors, closing of factories, and all the greatest of the evils incident to concentrated ownership in the form of a trust or consolidation would be avoided by permitting these agreements. There would no longer be an excuse for their existence. Such a system would also do away with the most cruel of all kinds of competition—that which is resorted to for the purpose of forcing the weaker competitor to choose between

facing ruin and selling his property to his stronger rival on the latter's terms.

Under this arrangement the stronger man would know that he could not acquire his weaker competitor except with the assent of the commission, and that this would not be accorded if the situation were brought about by unlawful or oppressive methods.

None of the oppressive expedients to crush competition that are resorted to where the former competing interests have been firmly and indissolubly banded together would characterize the operation of these pools or trade agreements for the plain reason that the interests of the parties are not permanent or identical. They are still competitors, subject to certain restricted interests in common. Each party to the arrangement operates his own factory at his own risk and for his own benefit. The agreement is limited as to time. They may resume open and unrestricted competition upon the termination of the agreement. They cannot afford to exchange trade secrets or to go into co-operative schemes to cripple outside competition, even if they were permitted to do so. On all these points their methods and operations would be in marked contrast with those of trusts and consolidations where there is a single, permanent ownership with all the concentrated power and unity of interest involved.

The proposed remedy may be summarized as follows:

(1) The compulsory Federal incorporation of all corporations engaged in trade or commerce between the States or with foreign countries.

(2) The creation of a commission similar in its powers over business corporations to those now possessed by the Interstate Commerce Commission over railroads and the utilization in that connection, so far as possible, of the present Commerce Court.

(3) That this commission pass upon the right of every applicant for a Federal charter, and that where violations of law exist which would prevent the granting of such a charter such violations should be first removed.

(4) That the commission have power to authorize and approve agreements that will be enforcible in the courts in the form of pools, kartels, or syndicate arrangements for regulating competition in any industry, provided such agreement does not have the effect of unreasonably restricting

competition or of operating as a direct restraint of trade; that in that connection it be empowered from time to time to determine the extent to which prices may be fixed or production restricted, and particularly to prevent any interference by the parties to the agreement with outside competition.

(5) That the Sherman Anti-trust Law be enforced against existing offenders, and that the execution of the details of the judgment be intrusted to the commission, subject wherever necessary by reason of constitutional limitations to the approval by the Court and the adoption by the latter of the findings of the commission.

(6) That (*a*) the criminal section of the Anti-trust Law, (*b*) the provisions allowing an injunction against the creation or continuance of violations, and (*c*) the provisions for the summary seizure and confiscation under Section 6 of all property in interstate transit of any corporation operating in violation of the statute be rigidly enforced.

With such a programme and an administration in sympathy with it, and with the energy and ability necessary to carry it out, every existing violation of the law would soon be corrected so far as that would be possible, and we would have a consistent, workable plan instead of the present intolerable condition; floundering and insincere on the part of the administration and chaotic from the point of view of the business community.

It is hoped that the pending agitation will continue with all the light that can be had from every direction until the necessary reforms are embodied in constructive legislation that will remove this question from the domain of party strife. Its early solution is too essential to the general welfare to be made the football of political contentions and ambitions.

The Congressional investigations now under way will assist in educating the people to an understanding of the peril and urgency of the situation. The testimony taken at the future sessions of the Committee of Inquiry into the Steel Corporation (which has not yet scratched the surface and from which it would appear that the investigators are thus far uninformed as to the important facts concerning the organization of the company) has already keenly aroused public curiosity. The huge sums involved and the dramatic human interest attaching to the chief actors in the boldest

and most gigantic financial and industrial operation that the world has ever known are bound to hold public attention.

It is important that the investigation shall be thorough and that the reports of the testimony as distributed shall be comprehensive and free from bias, color and influence (no easy task in these days). The Committee should not be compelled to rely upon the accountants and experts of the corporation. It should be furnished its own experts and accountants and all the assistants necessary for an exhaustive inquiry.

The uniform record of the corporation from the beginning has been one of entire frankness and of the fullest publicity in dealing both with the public and with its shareholders. In that respect its conduct has been a wholesome object-lesson to the trusts and corporations that had been operating in the dark as blind pools and had been for years permitted to do so, to the amazement of every other civilized country.

The example of the Steel Company more than any other factor forced the abandonment of these " dark-lantern " methods of finance. For that service the country owes it a great debt of gratitude, for its power is so great that no such concession, however just or necessary, could have been wrested from it by the Law; whilst the Stock Exchange, which is responsible for its securities, has ever been a willing servant of the interests that dominate the trust.

Judging, therefore, by the praiseworthy past record of the Steel Company, the Committee is justified in expecting every aid. We should thus learn of the community and identity of interest and control between the Company and its dominating owners and Directors on the one hand and (1) the Railroads of the Country; (2) the great Banks, Trust Companies, and Life Insurance Companies, with their billions of dollars of other people's money, and all that this means; (3) the inexhaustible reserves of iron ores that the Company owns, and which together with its railroad and financial connections places many of the so-called " independents " at its mercy.

In the last analysis it will be found that the peril to the country from these vast accumulations of wealth and power has been greatly underestimated.

Without stopping to criticise the way in which this new-found power, so fearful in its potentialities for evil and oppression that the brain fairly reels at the effort to realize it, has been or is being exercised, we are confronted with the

problem of how to encompass its destruction and to prevent its recurrence. It may be conceded for the sake of argument that the power now happily rests in the safest possible hands with the highest sense of responsibility to the State—a benign, well-meaning, public-spirited monarch of the financial destinies of the Nation, if you please, although there are conflicting opinions as to his disinterestedness and public spirit.

But a monarch none the less, and not even a constitutional one at that, for he confessedly has all the power of a despot to make or destroy. How long will we patiently contemplate or tolerate the possibilities of such a condition of vassalage, no matter what may be the present realities? No one can say how soon the power may drift into more ambitious and less scrupulous hands. It is incredible and intolerable that it should rest with any one man or group of men by a word to make and unmake men who have no relations with them, to close banks and trust companies, precipitate and avert and compose panics in the financial world, control the security and commodity markets, dominate the railroad and industrial world so that by a word the channels of credit are dried up and shrivelled as if by magic against any individual or enterprise whose property he may covet or that it is his will to destroy.

The picture is not exaggerated. If anything it is understated, for there is a brotherhood of self-interest between this modern King of finance and all that serve under him in the same cause that welds them together as one, regardless of personal ambitions, jealousies, and enmities.

Whenever in the past our country has faced a great crisis the man to meet it has been found among us. Let us hope that we shall now find the constructive statesman and patriot to rid us of this fatal blight and put in its place a healthy industrial and financial freedom under which we may live and prosper. We need him now. His first work will be to lead us safely out of the clutches of the Trusts that with our aid and encouragement have been fastened upon us and have kept us all these years in their grip. That accomplishment will be the best and highest test of his statesmanship. The rest will be easy.

SAMUEL UNTERMYER.